

IMPLEMENTATION OF SMALL BUSINESS SUBCONTRACTING PROGRAM

HEARING BEFORE THE COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES ONE HUNDREDTH CONGRESS SECOND SESSION

WASHINGTON, DC, JULY 6, 1988

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IMPLEMENTATION OF SMALL BUSINESS SUBCONTRACTING PROGRAM

WEDNESDAY, JULY 6, 1988

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room 2359-A, Rayburn House Office Building, Hon. John J. LaFalce (chairman of the committee) presiding.

Present: Chairman LaFalce; Representatives Skelton, Sisisky, Hayes, Conyers, Bilbray, Mfume, Lancaster, Meyers, Rhodes and Hefley.

Chairman LAFALCE. The Small Business Committee will come to order.

According to the Small Business Administration's fiscal year 1987 report on Federal procurement, of the \$177 billion in contract awards last year, large firms subcontracted \$63.4 billion or nearly 36 percent of the face value of all awards. Small business received 41 percent of these subcontract awards, or about \$26 billion, while small disadvantaged concerns received slightly over \$1.5 billion for 2.4 percent.

As these statistics indicate, the subcontracting program is of immense significance because it literally involves the distribution of billions of taxpayers' dollars. Further, it is my expectation that the program will take on added significance for three principal reasons.

First, there is a relentless trend on the part of some agencies to consolidate numerous and sometimes unrelated requirements into one large consolidated or umbrella contract. This procurement technique, if indiscriminately used, can not only reduce competition at the prime contract level, but can also result in a contraction of the industrial mobilization base. Nevertheless, it is a phenomenon that exists and that must be addressed.

Second, as recent procurement scandals so clearly indicate, the Government must constantly search for new and innovative ways to expand competition at all levels in the procurement process. We simply cannot afford to overlook a pool of over \$63 billion in subcontract awards.

There is no better way to introduce more competition into the acquisition system than by introducing the acquisition system to small business. A vigorous subcontracting program can do that.

Finally, section 1207 of Public Law 99-661 imposed a 5-percent procurement goal on DOD purchases from small disadvantaged

business. It is clear that large business must play a role in order to achieve this objective.

The present DOD prime contractors are subcontracting only about 1.9 percent of the subcontract dollar to small disadvantaged business. This effort begs for improvement. However, we must be careful that this improvement does not take place at the expense of other small businesses, and that is difficult.

This committee has made persistent efforts in the past to increase subcontracting with small business. It was this committee that first proposed individual subcontracting plans that became part of Public Law 95-507. It was this committee that found massive instances of noncompliance with the statute in the 1979-80 period that demanded and received the direct attention of President Carter. I was chairman of the subcommittee at that time that had the responsibility for looking into this and did, very aggressively.

It was this committee that, in 1982, issued an investigative report on the program, calling for remedial measures, and it was this committee that, just 1 month ago, was successful in removing a provision from the DOD authorization bill proposed by big business that would have gutted the program.

We are here today to review the results of the latest investigation of the program. That report, unfortunately, shows little progress, a business-as-usual mentality, a disregard for congressional directives by various Government agencies and Government contractors.

I am, frankly, becoming increasingly less tolerant at the incessant stream of bureaucratic excuses we hear whenever we find bad administration of a small business program. No matter what the excuse, how can we condone or even understand, for that matter, why, after 10 years of implementation, the GAO found 52 out of 100 NAVAIR contracts did not have plans, even though the law required that they have such plans?

How can we tolerate the fact that GSA fails to require utilities to submit plans, even after a Department of Justice ruling it requested, held that such plans must be submitted, regardless of whether a formal contract is executed?

There are difficult questions that will be asked today and difficult decisions that this committee will be required to make, but above all else, one thing is clear. The time for excuses has ended. We shall have accountability. Small business wants no more and this committee will ensure that they receive no less.

With that, I would like now to introduce into the record the opening statements of the distinguished ranking minority member, Representative McDade, and Representatives Torres, Conyers, and Mfume. Without objection, so ordered.

[The opening statements of Mr. McDade, Mr. Torres, Mr. Conyers, and Mr. Mfume may be found in the appendix.]

Chairman LAFALCE. Are there any other Members of Congress who wish to make any statement at this time? Thank you.

Our first witness today will be Mr. L. Nye Stevens, the Senior Associate Director, General Government Division of the General Accounting Office.

**TESTIMONY OF L. NYE STEVENS, SENIOR ASSOCIATE DIRECTOR,
GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING
OFFICE, ACCOMPANIED BY MICHAEL EID, EVALUATOR [GAO]**

Mr. STEVENS. Thank you very much, Mr. Chairman.

I am accompanied today by an evaluator who worked on both of the requests from the committee that I will be summarizing today, Michael Eid, who is on my left here.

With your permission, Mr. Chairman, since we have a fairly lengthy prepared statement covering two different requests from the committee, what I would like to do, if it is all right with you, is summarize that in fairly short order and submit the whole thing for the record.

Chairman LAFALCE. We don't want to drag this out. We want to get to the facts.

Mr. STEVENS. Yes, sir.

Chairman LAFALCE. What have you been doing? It has not been very good. Why? What are you going to do to correct it?

Now, I am not saying that what you have done is not good or inadequate. You have done a good investigation. Would you report to us on that.

Mr. STEVENS. I will be very short, Mr. Chairman, and let the representatives from GSA and the Navy speak.

As you know, we did two particular jobs here. One was the compliance with the section 211 of Public Law 95-507, which requires subcontracting plans for large Federal contracts, except for contracts that are with small businesses themselves, contracts for personal services, contracts that are done entirely outside the United States, or in situations where the contracting officer certifies that there are no subcontracting opportunities.

We reviewed more than 2,000 contract files at 15 procurement offices in Washington, San Francisco, New York, Chicago, and Oak Ridge, TN, to determine the compliance of GSA, Department of Energy, and the Department of the Navy with these requirements.

Of the 968 GSA contracts that we examined, 503 did not contain subcontracting plans, but most of those were for valid reasons. For instance, 413 of those were awarded to small businesses and, thus, did not require a plan.

We did, however, find at GSA 11 contracts that should have had plans but did not. These were all multiyear awards in which the contracting officer had erroneously calculated the dollar value on an annual basis, which resulted in totals less than the \$500,000 level where plans are required, and we are told that GSA has recognized that error and is correcting it.

At the Department of Energy, we examined 457 contract actions or modifications, of which 233 didn't have subcontracting plans, but again, mostly for valid reasons. We found 15 contract actions at Energy, however, that should have plans. Six of these were, as in the GSA situation, multiyear actions that were erroneously calculated on an annual basis, but the other nine were the result, we were told at Energy, of oversight.

At the Navy, we examined the three largest commands in terms of procurement dollars, which spends slightly over half of all the Navy's procurement dollars, and looked at their 1986 contract ac-

tions. There were 627 of them that met the dollar threshold, and we found 272 without a plan.

While many of these—as in the other two agencies—were justified in not having a plan for the exceptions that I noted at the beginning, 84 of them, or 31 percent, were not, and this was a substantially higher total than we found at either GSA or Energy.

In all 84 cases, the reason given for the lack of the plan was oversight of the requirement.

I would like to skip over the question on goals. I notice each of the other statements has something on that. There is a good deal in the report on goals. Most of the goals, we find, though the data is inconclusive, were reportedly met.

We also found very little use of incentives, and none of the penalty provisions of the law.

Let me turn next to the utilities question, which was a follow-on request that the committee gave us after the completion of our work on the overall subcontracting goals. Although Federal procurement regulations require agencies to obtain a contract for all purchases over \$25,000, a number of utility companies, for various reasons, have refused to enter into contracts with the Federal Government.

In most instances, Federal agencies have no choice but to purchase these utility services without a contract, since alternative sources are not available. GSA, which has the lead role in utilities procurement, has made some progress, some considerable progress, in persuading public utilities to provide services to the Government under formal contract.

There were 41 areawide contracts 12 years ago. Today, we are told that there are 67, in addition to 12 single-user contracts that have been awarded by GSA.

On the other hand, we identified 23 companies which are listed in an appendix to my statement which have declined to enter into contracts with GSA. Of the 23 companies that are listed, 10 specifically objected to the requirement in Government contracts according to the law for subcontracting plans for small and small disadvantaged businesses. The other 13 cited more general objections to entering into contracts for service with the Government.

Based upon a review of the law, it is our opinion that a public utility which declines to enter into a formal contract with the Government is nonetheless legally required to satisfy the subcontracting plan requirements of section 211. We have prepared a legal opinion on this, Mr. Chairman, that is available today, and with your permission, we would like to submit that for the record.

Chairman LAFALCE. Yes; I have in front of me a document dated July 5, 1988, addressed to me and signed Milton Socolar for the Comptroller General of the United States.

Without objection, it will be entered into the record at this point. [The document may be found in the appendix.]

Mr. STEVENS. Another question we were asked, Mr. Chairman, was to look at a situation that arose in 1984 when GSA, in order to encourage more utility companies to execute formal contracts, requested approval from the Small Business Administration to modify the subcontracting clause so that it would have required plans only from subcontractors who were constructing or operating

facilities that were directly pertinent to providing service to the Government.

SBA approved that modification, but after an inquiry from this committee in 1986, they later reversed their position, and although GSA has subsequently stopped using the modified clause in its negotiations with utility companies, 26 contracts were awarded which contained that modified clause that our legal opinion also deals with.

Finally, you asked that we compare the efforts of GSA, and the Department of Energy, and the Department of Defense to assure that contracts for utility services comply with subcontracting plan requirements. We found that all of the utility contracts that were awarded by GSA that should contain the subcontracting plan did indeed do so.

The Department of Energy, which annually procures utility services costing about a billion dollars, didn't have centralized files or data on these procurements, so we couldn't look at them from that basis, but we did identify several instances in discussions with Energy personnel where utility companies had declined to enter into contracts with Energy and where contracts that should have had subcontracting plans did not.

Some examples of this include six utility companies that have declined to enter contracts generally because of objections in whole or in part with the subcontracting requirements that are the subject of the hearing today. Three utilities that have signed contracts, but insisted that the subcontracting clause be removed from the contract; one that has a contract with a subcontracting clause but hasn't submitted the required plan; and some that are now more than 10 years old, which was the general limit for utilities contracts, but which predate the law.

In fiscal year 1987, the Department of Defense purchased almost \$2 billion worth of utility services. We were told that most of these services were acquired under contract, although some utility companies, as in the other agencies, have declined to sign contracts with the military services.

Our discussions with various officials responsible for procuring utility services indicate that very few of the military utility contracts, if any, do contain subcontracting plans. A large reason for this is that the guidelines for this program, which were issued in 1974, and provide a standard format for utility contracts, predate the law requiring subcontracting plans which, of course, was not written until 1978.

We were told at the department level that in all probability, utility contracts written for the military would not contain subcontracting plans because the contracting officers were using this outdated—this guidance from 1974—and weren't aware of the requirement.

We contacted contracting officers at eight of the military commands, who told us almost unanimously—seven of the eight—that they didn't even know of the requirement and none were, in fact, enforcing it. None of the individuals were able to tell us of any contracts awarded by the military for utility services that did contain the required subcontracting plan.

That is all I will read of the prepared statement, Mr. Chairman, but we will be able to respond to any questions you would like, if you would like to proceed.

[Mr. Steven's statement, with attachments, may be found in the appendix.]

Chairman LAFALCE. Thank you.

I think we will hear from the other members of the panel first. Our next witness will be Vice Admiral William Rowden, commander of the Naval Sea Systems Command and Vice Admiral Joseph Wilkinson, commander of the Naval Air Systems Command.

How are we handling this? Who goes first? Admiral Rowden.

**TESTIMONY OF VICE ADMIRAL WILLIAM H. ROWDEN, U.S. NAVY
COMMANDER, NAVAL SEA SYSTEMS COMMAND**

Admiral ROWDEN. Mr. Chairman, I appreciate the opportunity to appear before the Small Business Committee to discuss the Small Business Subcontracting Program implemented at the Naval Sea Systems Command, which I will refer to, Mr. Chairman, as NAVSEA.

Small business and small disadvantaged business concerns have continued to play a crucial role in building and supporting our naval forces. NAVSEA contracts directly with many small businesses and small disadvantaged business firms, both at the headquarters and in our field activities located throughout the United States.

Additionally, NAVSEA strongly supports the Small Business Contracting Program established pursuant to section 8(d) of the Small Business Act, as amended by section 211 of Public Law 95-507.

You requested that my statement address several items concerning NAVSEA's implementation of the Small Business Subcontracting Program. The following paragraphs provide this information.

Subcontracting program goals for small business and small disadvantaged business firms are provided to NAVSEA by the Secretary of the Navy, with actual subcontracting program attainment reported by prime contractors assigned to NAVSEA for contract administration.

Subcontracting goals represent that portion of a prime contractor's total plan subcontracts which are to be awarded to small and small disadvantaged business concerns. As can be seen from the following chart, combined small business, small disadvantaged business subcontracting performance on NAVSEA-administered contracts has exceeded the assigned goals since fiscal year 1985. In fiscal year 1985, we fell short of the goal, which was 39.10 percent. We attained 38.13. In 1986, 1987, and 1988, we have exceeded the goals. 1986, 38 percent—our attainment was 40.92; 1987, 39 percent—our attainment was 46.2; and in 1988, through the second quarter, our goal was 41 percent, and we have attained 42.06 percent.

During August 1987, the General Accounting Office conducted an audit of contract actions awarded by NAVSEA headquarters in excess of \$500,000. Of the 296 NAVSEA contracts and contract modifications reviewed by GAO, 30, valued at \$153 million, were

identified as missing the required small business subcontracting plan. These 30 contract actions represent about 1 percent of the \$13 billion in contracts awarded by NAVSEA headquarters during fiscal year 1986 when most of these actions were taken.

Our review of the 30 contract actions indicated that 21 were modifications to existing contracts awarded during fiscal year 1981 through 1986, that already had small business subcontracting plans in place. The modifications should have caused these existing plans to be updated and the contract files appropriately documented. The remaining nine cases were basic contracts awarded during fiscal years 1985 and 1986 that should have included small business subcontracting plans.

Subsequently, all contracts and contract modifications have been amended to include subcontracting plans, except contracts on which performance was already physically complete. The GAO report also included comments concerning the size of subcontract goals, contractor achievement against the goals, and remedial actions for substantial nonperformance of subcontracting plans.

Comment on these issues would require a case-by-case analysis. The report does not identify the contract nor contract modifications which are apparently in contention.

As a result of this review, and to emphasize the need for future compliance with regard to the Small Business Subcontracting Program, we have implemented revised internal controls to ensure inclusion of subcontracting plans where required for actions in excess of \$500,000. This is being accomplished by the use of the standardized NAVSEA form which requires the contracting officer to coordinate through the Command Small and Disadvantaged Business Utilization Office in making a positive determination of compliance with subcontracting plan requirements. The form also ensures incorporation of the resultant subcontracting plan into the contract prior to award.

Recent Navy-wide actions have also assisted NAVSEA with maintaining subcontracting plan compliance. For information, they include: Subcontracting plan compliance has been established as an item of special interest in Navy-wide procurement management reviews; the Navy's small business labor set-aside review form was revised to incorporate a special section calling attention to the contracting officer to subcontracting plan attainment review requirements; and a revision of Navy acquisition plan preparation plan guidance is in process which will require a discussion of subcontracting planning involving small and small disadvantaged business subcontract plan goals.

In addition, in order to validate NAVSEA subcontracting plan requirements for contracts awarded since completion of the GAO audit, we recently conducted an internal review of all NAVSEA headquarters contracts which require a subcontracting plan and were awarded on or after implementation of the revised internal controls I mentioned earlier.

This review included 232 contract actions awarded from 9 September 1987 through 31 May 1988. For all new contracts, we found that plans have been incorporated. However, in the case of the exercise of options, all basic plans were not properly updated, and we are taking additional action to correct this deficiency now.

During fiscal years 1986 and 1987, no cure notices or remedial contract actions were taken as a result of prime contractors' failure to include or execute properly a valid subcontracting plan. For contracts missing the required subcontracting plan, actions have been completed to obtain, review, and incorporate the necessary subcontracting plan into all contracts where they are not physically completed.

Effective incentive clauses used in conjunction with subcontracting plan goals have proven extremely difficult to both formulate and administer. These clauses are intended to motivate the prime contractor to increase subcontract awards to small business and small disadvantaged business concerns. To be effective, a contractor's current small and small disadvantaged business subcontract levels must be baselined as a measuring point.

For repetitive procurements of identical items from a contractor, a baseline can be established. Given the complexity of many of our NAVSEA weapon system procurements, quantification of previous contractor performance for incentive purposes has not been possible. No subcontracting program incentive clauses were included in NAVSEA contracts during fiscal years 1986 and 1987.

The 30 NAVSEA contract actions identified in the GAO audit as containing subcontractor program incentive clauses have been reviewed and do not include incentive provisions for the subcontracting program. These contracts were improperly coded for input into the master data file and actions to correct these coding errors are in progress.

Training of acquisition personnel on assessment of subcontracting plans is an ongoing effort at NAVSEA, which involves both formal and on-the-job instruction. The requirement for evaluation of a subcontracting plan, detailed review of the goals and subcontracting opportunities, and contracting incorporation and monitoring procedures are addressed in both formal procurement courses and in on-the-job training.

Subcontracting opportunities vary substantially for each procurement and each prime contractor, thereby requiring an individualized assessment of subcontracting opportunities for each procurement. Upon completion of this assessment, a determination is made by the contracting officer as to whether the subcontracting goals provided by the prime contractor in the subcontracting plan present the maximum practicable opportunity for small and small disadvantaged business subcontracting.

Plans obtained by the contracting officer are then subjected to review by our Command Small and Disadvantaged Business Utilization personnel.

In conclusion, Mr. Chairman, the Naval Sea Systems Command will continue to strongly support the critical small business and small disadvantaged business base through both direct prime contract awards and the subcontracting program. The recent GAO audit identified a problem involving a small percentage of the NAVSEA contract actions which is being corrected. An effective program is in effect for compliance with the subcontracting program requirements and which, when combined with the ongoing Navy-wide initiatives, will effectively serve to assist in the attain-

ment of maximum practicable subcontracting opportunities for small business and small disadvantaged business concerns.

Thank you very much, Mr. Chairman.

[Admiral Rowden's statement may be found in the appendix.]

Chairman LAFALCE. Thank you, Admiral.

Admiral Wilkinson.

**TESTIMONY OF VICE ADMIRAL JOSEPH B. WILKINSON,
COMMANDER, NAVAL AIR SYSTEMS COMMAND**

Admiral WILKINSON. Mr. Chairman, members of the committee, I want to thank you for inviting me here before this committee to review the Naval Air Systems Command's [NAVAIR's] implementation of the Small Business Subcontracting Program.

NAVAIR is responsible for the acquisition of aircraft, engines, missiles, and systems for support of the Navy and the Marine Corps. The complex products we acquire are manufactured principally by the Nation's largest corporations, which have developed the special facilities, skills, and capabilities to produce and perform the complex function of integrating sophisticated weapons systems. Many of the subsystems and components are produced by our Nation's small business firms.

We at NAVAIR are active in promoting small business prime contracting and subcontracting opportunities. In the current fiscal year, we expect to award approximately \$300 million to small business firms directly. This includes the award of about \$98 million directly to small disadvantaged business firms.

Perhaps of even greater significance, through April 1988, 27.6 percent of all subcontracting dollars under our prime contracts which we administer is going to small business firms. These results have been brought about through the efforts of our command's contracting officers and small business personnel working with industry. It involves the detailed review of small business subcontracting plans, make-or-buy plans, and special initiatives. Most importantly, results are motivated by our consideration of a contractor's small business performance in negotiating his contract profits.

Recently, NAVAIR initiated a pilot program to increase small disadvantaged business participation at the subcontractor level on our major programs. For example, in our negotiations of the fiscal year 1988 F-18 aircraft contract, we provided the prime \$250,000 as part of the negotiated price for the prime to develop a small disadvantaged business second-source for a video relay panel, a complex state-of-the-art electronics subsystem which has annual requirements on the F-18 alone approaching \$2 million. This will provide a small disadvantaged business the opportunity to develop a capability involving new technology with significant spinoff potential. It also provides us with a qualified second-source for this aircraft subsystem. We intend to work closely with our prime contractor in monitoring his progress on the subcontract and to seek similar opportunities on other programs. In general, we at NAVAIR have been promoting small business, and specifically the Small Business Subcontracting Program, aggressively. Although it was reported by the General Accounting Office [GAO] that 52 NAVAIR contracts and contract modifications of the 216 reviewed did not have a sub-

contracting plan, we reported in April in 1988 that of those identified by the GAO, subcontracting plans for 27 had been received, reviewed, and incorporated. Most of the other contracting actions questioned involved contract modifications where our contracting officer anticipated contractor performance at the level as approved in the subcontract plan incorporated in the basic contract.

Now, our internal procedures should have required such documentation of the contract file. Our further review pointed out several administrative deficiencies that we have taken action to correct, including the establishment of positive controls to ensure that a subcontracting plan has been reviewed and approved prior to the award of definitive contracts or prior to definitization of advanced acquisition contracts or ceiling-priced modifications.

Of the 52 contracts that should have had plans, a number of them were in the modification area, and 37 of these 52 were contract modifications.

Mr. Chairman, in your letter of 17 June, you asked that I address several specific areas. My comments on each of these areas are as follows: Regarding our response to the GAO report, we reviewed the contract file for each contract identified as not having a small business subcontract plan. As I have just mentioned, 27 of the 52 cases where it was reported the plans were overlooked, the plans have been received, reviewed, and incorporated into the contracts or the modifications. Most of the other cases involved contract modifications, where our contracting officers anticipated performance at the same level as approved in the plan that was in the basic contract. However, our internal procedures should have required the file to be documented to this effect. We have subsequently revised our procedures and provided training to our contracting officers to ensure that separate plans are received for modifications or that the file is properly documented where an additional plan is not required.

The contract dollar value of the 52 cases was \$380 million. The estimated dollar value of those contracts that should have had plans was approximately \$110 million, excluding those contracts or contract modifications for which plans were obtained and contracting actions were definitized after GAO review of the file.

The NAVAIR assistant commander for contracts has taken action to establish strict controls to ensure that small business subcontract plans are reviewed and implemented in contracts or contract modifications and that the file is documented appropriately when a plan is not required. To this end, we have included critical performance factors in personnel evaluation reviews and have established specific procedures to review each contract or modification at the time of award or definitization.

With regard to cure notices, although we have not issued any cure notices, we have held up contract award pending submission of an acceptable subcontracting plan on numerous cases in the past 2 years. Some examples are the H-1 Night Targeting Systems [Bell Helicopter], H-53 Night Vision System [Sikorsky], the A-6 Wing Replacement Program with Boeing. These instances have caused us to address small business subcontracting requirements to the chief executive officers of our major prime contractors.

In no instances in the last 2 years have incentive clauses, per se, been used in conjunction with subcontracting plans. However, at NAVAIR, a contractor's past performance in subcontracting with small business is considered both in evaluating proposals for future awards and in assessing how much profit he will get from that contract.

The average small and small disadvantaged business subcontracting goal and this command's accomplishments against the goal over the past 4-year period are as follows:

Fiscal year 1985, our goal was 25.3 percent. We achieved 24.9 percent.

Fiscal year 1986, the goal was 25 percent. We achieved 25.73 percent.

Fiscal year 1987, the goal was 25.7 percent. We achieved 29.4 percent.

In fiscal year 1988, our goal was 27 percent and through April of this year, we have achieved 27.6 percent.

Training continues to be provided at all levels. The command's associate director of small business attends all contracts directorate staff meetings where ongoing progress is reviewed. Each contracting officer has attended professional training courses on small business contracting, and periodic training is conducted to highlight changes to small and disadvantaged business procedures.

In order to validate our compliance with subcontracting plan requirements for contracts awarded since the completion of the GAO review, we recently conducted an internal review of all headquarters contracts which required a subcontracting plan and which were awarded from 1 October 1987 through 31 May 1988. For the new contracts, we are in good shape; all comply with the statute. However, in the case of contract modifications, all basic plans were not properly updated. We are taking actions to ensure that incomplete plans are updated or the file is properly documented with contracting officer certifications. We have set up another control system, a single point of contact that all contract modifications have to pass before they are awarded.

I can assure you, Mr. Chairman, and committee members, that we do not take our responsibilities for small business lightly. I believe our program is sound and viable, and we are making every effort to make it even better. We have strengthened the administrative process and instituted the proper controls. We intend not only to hold contracting officers accountable for compliance with applicable laws and regulations, but also with achieving improved small business subcontracting opportunities on our major programs.

Thank you very much.

[Admiral Wilkinson's statement may be found in the appendix.]

Chairman LAFALCE. Thank you, Admiral.

We will next hear from Mr. Richard Hopf, the Associate Administrator for Acquisition Policy for the General Services Administration, accompanied by Mr. Brian Polly and Mr. Lou DeProspero.

I should also have pointed out that Mr. Stevens of the GAO is accompanied by Mr. Michael Eid, who was the actual person who conducted the two audits for the agency.

Mr. Hopf.

TESTIMONY OF RICHARD H. HOPF, DEPUTY ASSOCIATE ADMINISTRATOR FOR ACQUISITION POLICY, GENERAL SERVICES ADMINISTRATION, ACCOMPANIED BY LOU DEPROSPERO, ASSISTANT COMMISSIONER, FEDERAL SUPPLY SERVICE AND BRIAN POLLY, ASSISTANT COMMISSIONER, PUBLIC BUILDINGS SERVICE

Mr. HOPF. Thank you, Mr. Chairman.

I am pleased to appear before you today to respond to questions concerning GSA's implementation of the Small and Small Disadvantaged Business Subcontracting Program established by section (8)(d) of the Small Business Act, as amended by section 211 of Public Law 95-507.

I am accompanied today by Mr. Lou DeProspero, who is the Assistant Commissioner of GSA's Federal Supply Service, and Mr. Brian Polly, who is the Assistant Commissioner of GSA's Public Buildings Service. Mr. Polly is responsible for the GSA's Public Utilities Acquisition Program.

The General Services Administration is generally pleased with its record of implementation of the Small Business Act in general, and we are generally pleased with our implementation of section (8)(d) in specific. For example, GSA achieved the combined small and small disadvantaged subcontracting attainment representing 33.8 percent of the value of the total subcontracting subject to the program in fiscal year 1987. This achievement exceeded the subcontracting goals which were established for the agency.

Recently, we did receive a copy of GAO's draft report summarizing its review of GSA's compliance with section (8)(d) of the act. We believe the results to be generally favorable for the General Services Administration in that they show that fewer than 1 percent of the total number of contracts reviewed failed to comply with the program's requirements. The agency's failure in those instances was not the result of neglect or oversight on the part of the contracting officers, but rather was the result of a misinterpretation as to how the dollar value is to be determined in a multiyear contract environment. Those situations, except for those contracts that have already been completed, are being corrected, sir, to include the required plan.

Since inception of the subcontracting program, however, GSA has faced a difficult challenge in implementing section (8)(d) with respect to public utility contracts. Historically, many utility companies have been reluctant to enter into Government contracts containing clauses which require subcontracting plans. Given the sole-source nature of the industry, GSA has generally been at a disadvantage at negotiations. Nonetheless, a great deal of progress has been made.

In 1980, for example, GSA's Public Building Services obtained only one public utility subcontracting plan with a small business subcontracting goal of \$85,000. Today, the Public Building Service has achieved utility contracts containing over 65 plans representing a value of approximately \$2 billion on a companywide basis.

Mr. Chairman, I have appended to GSA's formal statement the specific questions that have been asked of GSA by the committee and our answers. In the interest of brevity, I would ask that they

be submitted for the record. Mr. DeProspero, Mr. Polly, and I would be glad to try to answer any questions that you might have.

[Mr. Hopf's statement, with attachments, may be found in the appendix.]

Chairman LAFALCE. Thank you very much.

I am only going to ask a few questions to begin with, and then we will come around with some more questions at the end, but I want to give all the members on the panel an opportunity.

GAO. What are your principle concerns now? With NAVAIR, there were an awful lot of contracts and a high percentage of the contracts for which they didn't have any subcontracting plans. Correct?

Mr. STEVENS. Yes, sir.

Chairman LAFALCE. With GSA, they totally disregarded that official opinion that said, with respect to utilities, you have to have subcontracting plans for that. Correct?

Mr. STEVENS. I would say that is a bit of an overstatement with regard to—

Chairman LAFALCE. Well, refine it a bit.

Mr. STEVENS. GSA has made steps in getting contracts at all. Some of these have plans. As I think Mr. Hopf pointed out, there is some reluctance on the part of the utilities themselves to accept the subcontracting requirements. They are making some progress.

Chairman LAFALCE. But this is called for by law. If they want the contract, they have to comply with the law, right?

Mr. STEVENS. Yes, sir; but I think the fault lies more with the utilities than with GSA.

Chairman LAFALCE. The GSA can't enter into a contract in violation of the law, can it?

Mr. STEVENS. The utilities refused to enter into a contract in many of these cases. They refused to sign a contract with GSA.

Chairman LAFALCE. OK. Then is GSA going ahead and signing the contracts without the clause?

Mr. STEVENS. No, sir; but they are accepting the service.

Chairman LAFALCE. Haven't we had a ruling that accepting the service is a way of circumventing the law? Hasn't the Justice Department rendered that ruling?

Mr. STEVENS. You might say that, sir.

Chairman LAFALCE. I just said it.

Mr. STEVENS. I don't think there is an alternative to accepting this.

Chairman LAFALCE. Isn't that the July 5 ruling of GAO also?

Mr. STEVENS. Yes, sir; we agree.

Chairman LAFALCE. OK, so we agree.

Mr. STEVENS. Yes, sir.

Chairman LAFALCE. So, GSA is violating the law if they sign the contract, and they are violating the law, circumventing the law, if they don't sign the contract and then have the work performed without that provision, correct?

Mr. STEVENS. Yes, sir; I would say the law is circumvented without a contract.

Chairman LAFALCE. Fine.

Now, what is your judgment regarding the remedial options that have been taken by both NAVAIR and GSA? Or are you on top of that?

Mr. STEVENS. Yes, sir; I believe we are. In the Naval Air case, I think, as the Admiral stated——

Chairman LAFALCE. What is the percentage, again, of NAVAIR cases that you looked at where there were contracts——

Mr. STEVENS. The Navy—overall, it was 31 percent.

Chairman LAFALCE. NAVAIR in particular.

Mr. STEVENS. Right. NAVAIR was the worst of those; yes, sir.

Chairman LAFALCE. What was NAVAIR's?

Mr. STEVENS. NAVAIR—of 100 contracts that did not have plans, 52 did not have a justified reason, so it was more than half.

Chairman LAFALCE. All right, 52 percent.

Admiral WILKINSON. If I may, sir, this was not a total review of our contracts. Of the 216 reviewed, 52 did not have plans.

Chairman LAFALCE. No; it is of those reviewed——

Mr. STEVENS. No, sir; that is of the contracts that did not have plans, which was 100.

Chairman LAFALCE. I see.

Mr. STEVENS. Forty-eight had justified reasons for not having plans, such as with small business. Fifty-two were simply a matter of oversight.

Chairman LAFALCE. OK. What percentage of their prime contracts that had subcontractors did not have plans?

Mr. STEVENS. What percentage? Of our sample, I believe it was 272—NAVAIR—there were 116 with plans, 100 without. Of the 100 without, 52 did not have a justifiable reason.

Mrs. MEYERS. Mr. Chairman, may I ask a question for clarification?

Chairman LAFALCE. Surely.

Mrs. MEYERS. What do the utilities use subcontractors for? I mean, are these people who do maintenance, or what are they used for?

Mr. STEVENS. GSA may be better able to answer that than I am. My impression is there is a good deal of maintenance work that goes on, supplies of various kinds.

Can you elaborate on that?

Mr. HOFF. There is probably, as a general rule, relatively little subcontracting that goes on that is directly involved in the provision of the service just to the Government, ma'am. It is probably more of a situation where you look at it on a companywide basis in the sense that the utility is providing a commercial product or a commercial service to the general public, and the cost of providing these services to GSA are subsumed in their overall cost of doing business.

So, to the extent that they do subcontracting, it is probably more along the lines of subcontracting generally, as you indicated, for the maintenance of their facilities, for the operation of equipment, things like that, not particularly uniquely addressing the GSA's requirement, but addressing the provision of the service generally to the public.

Chairman LAFALCE. Let's get back to order here.

Insofar as NAVAIR is concerned, there are little over 200 contracts that were reviewed. About 100 of them didn't have any subcontracting plans and about half of those were justified and half were unjustified.

Mr. STEVENS. Yes, sir.

Chairman LAFALCE. That is it. It seems to be a very, very high percentage to me. My question is, you say you have taken remedial steps with respect to those particular 50 or so contracts, and I am most concerned about the remedial steps you are taking for the future to ensure that if 100 out of the 200 should have had subcontracting plans, they all should have subcontracting plans.

You have said you have taken remedial steps. Does GAO have a judgment as to whether the remedial steps they have taken should bring them into total compliance? I can't see the reason for 95 percent compliance. To me, it is pretty simple. The law has been on the books for a long time. You have to have a plan with the contract. It is simple. You should have 100-percent compliance. Every single subcontractor—every contracting officer in the U.S. Government either knows that or should be fired. If they don't know it—that is so essential. That is basic. That is one, two, three, A, B, C, D. That is not some far-out esoteric issue. That is very basic. Everyone must know that. They can't call themselves a contracting officer if they don't. Simple, 100 percent, not 99 percent.

Do you think you are going to be able to have 95 percent of those instances when you probably should have them?

Admiral WILKINSON. Yes, sir; I think we will. I am certainly not proud of our performance. Thirty-seven of the 52 were contract modifications. Frankly, there was a misunderstanding, I think, by our contracting officers. They needed more training. They thought that the basic contract plan was still applicable if they had a contract modification, and that is not according to the law.

Each modification has to have that plan updated. We can fix that, and I think we have. I am more concerned about the basic contracts that did not have plans because everyone should have known that.

Chairman LAFALCE. That is very aggravating, no question about it.

Admiral ROWDEN. Mr. Chairman, I certainly echo Admiral Wilkinson's comments. I was most concerned about the basic contract that did not have plans. Nine of the 30 that were deficient in NAVSEA did not have—of the basic contracts—did not have plans.

We had that taken care of, because you can handle that very quickly. We have looked at subsequent contracts. That is, from the time of the end of the GAO audit, which was last October or November, until May of this year, at this time here, that I can report on it, all of those basic contracts have the plans.

I believe the word is there. I think it is a matter of training. I have 77 contracting officers in NAVSEA and handle somewhere between \$12 and \$16 billion worth of procurement each year. These people turn over at the rate of between 20 and 22 percent.

Chairman LAFALCE. I appreciate that fact.

As a matter of fact, not too long ago, I saw a program on C-Span. It was somebody from some agency who was explaining the contract procedure, and I said, "By God, we're going to have to try to

do something to simplify that." You have to go through a million and one hoops, and I understand that. I understand an awful lot of those hoops have been created by the Congress. They are good hoops, but somehow we ought to simplify it for you.

On the other hand, this is an easy one to understand. There is nothing complicated about this. This states that you shall have in your subcontracting plans certain language and call for certain best efforts, and this is elementary. This is not algebra; this is simple two-plus-two type of arithmetic as to what the contracting officer should know.

I think you agree with that.

Admiral ROWDEN. I don't disagree with you at all and certainly there should—there are—

Chairman LAFALCE. Let me go quickly to GSA.

Does GSA accept the fact that even if you don't have a contract in writing, there is a necessity that there be some type of relationship that puts a legal requirement on your subcontractors to make best efforts to comply with Public Law 95-507? What are you doing about these instances where the utilities don't want to enter into a contract? Is the reason they don't want to enter into a contract specifically because they want to avoid this subcontracting plan, or does it have to do with other factors?

If it is because they want to avoid the subcontracting plan, then it would seem to me that we should prohibit GSA from doing business with those utilities and maybe establish some type of penalties. Then they are definitely, deliberately in a premeditated way attempting to violate the law by circumventing it, by evading it.

There is a difference between tax avoidance and tax evasion. This is a direct evasion, which is illegal.

Mr. HOPF. Yes, sir.

GSA shares your frustration on this subject, Mr. Chairman, but it is a very difficult subject. As you know, certain utilities are sole-source suppliers by their very nature, and, in fact, I believe the electric utility industry has been, by statute, designated as a sole source of supply for the Government. A local franchised utility is the only one available for us to use by law.

In those cases, our leverage in negotiation is not particularly good, as you might imagine. Unlike other situations, other—

Chairman LAFALCE. Would it be easier for you if we mandated by law some form of liquidated damages?

Mr. HOPF. Not really, sir, because the problem—

Chairman LAFALCE. We might do that whether you like it or not.

Mr. HOPF. No objection to that. In fact, if we were going to have such a penalty, I think probably it would be correctly reflected in the statute, as opposed to administratively.

Chairman LAFALCE. That is what I am talking about, putting something in the statute which says these companies that want to play this game shall suffer a severe financial penalty.

Mr. HOPF. Yes, sir; and I would agree with you. If there is to be a penalty, it should be reflected in the statute. But the difficulty is in distinguishing between the situation where you have a contract, and what can you do about a contractor's failure to meet its contractual requirements, and the situation of how do you get them

into the contract in the first place? That has always been our difficulty.

Some of the utility companies have been extremely reluctant to enter into a formal contract with formal contract requirements, Public Law 95-507 implementation just being one aspect of it. There are many other standard Government contract clauses that they may find objectionable.

Given that situation, we have been forced to deal with them like any other public user, simply ordering utility services on a periodic basis with no formal contracting mechanism. All the Department of Justice memorandum does for us is to say that even in that situation, even though it is not a formal contractual relationship, it is sufficiently a contractual relationship for the law's requirements to apply.

What that means is that it is an instruction to us to get that clause into the contract.

Chairman LAFALCE. How do you get the clause into a contract if there is no written contract?

Mr. HOPF. That is the difficulty with the situation. How do you get the clause—

Chairman LAFALCE. How are you handling it? Are you just not trying to? Are you just saying we will forget about—

Mr. HOPF. No, sir; not at all. The tactic that we have been using over the last 8 years has been one of persuasion and education, and I think we have made some definite progress in that direction.

If you compare where we are now with public utilities to where we were 8 years ago, there is a dramatic difference.

Chairman LAFALCE. Was it GSA that requested the ruling from the Justice Department?

Mr. HOPF. Yes, sir.

Chairman LAFALCE. When did you get that ruling from the Justice Department?

Mr. HOPF. We got that last March, I believe, sir—excuse me, March 1987.

Chairman LAFALCE. March 1987. I have a letter here from the Arlington County, VA, Department of Public Works that says—this is dated February of 1981—"Thank you for your letter dated February 9, 1981." This is written to GSA. "Please consider this a definite and final refusal to enter into an areawide contract for sewage disposal so long as those contracts require the implementation of section 211 of Public Law 95-507."

Bingo. I mean, that is it, right there. It took you a long time—not you, necessarily, personally, but it took GSA a long time, from 1981 to 1987, to request a ruling from Justice. A long time ago, they had, in my judgment, bad actors, individuals who just didn't want to comply with the law, and they said, "So long as you are going to make us try to comply with the law, we won't even sign a contract with you."

Mr. HOPF. That is correct, sir. It is a frustrating situation and the difficulty is—

Chairman LAFALCE. I think it could have been handled a little better, rather than waiting 6 years to ask for a legal opinion.

All right, now you have a legal opinion. What have you been doing since the legal opinion?

Mr. HOPF. We have been doing two things. We have been adding that legal opinion to our tools to persuade public utility industries to get involved in the program, to enter into the contracts with us to give us the formal plans—

Chairman LAFALCE. Persuasion is great. Have you told them—have you threatened them with a lawsuit?

Mr. HOPF. No, sir; we haven't taken that step.

Chairman LAFALCE. Have you considered it?

Mr. HOPF. Yes, sir; we have.

Chairman LAFALCE. May I see the memoranda that has been written regarding the legal recourse in those situations? I officially request it for the committee.

Mr. HOPF. Yes, sir; I don't believe that there are any internal memoranda considering that issue.

Chairman LAFALCE. If there are none, I would like a statement that you have made a search of the records, and that there are none.

Mr. HOPF. Yes, sir.

Chairman LAFALCE. Otherwise, I would like them.

Thank you.

[The information may be found in the appendix.]

Chairman LAFALCE. I have a lot more questions, but I think I had better, as I said, defer.

Mr. Rhodes.

Mr. RHODES. Mr. Chairman, there may be something I am missing here, but it seems to me when the Federal Government is dealing with a public utility, which is certificated and franchised to operate a monopoly by the appropriate State or local agency, whichever it may be, as a provision of that certification, they are required to provide service to all within their certificated area who request that service, and they are required to provide that service at tariffed rates, and they cannot decline service. They do not routinely enter into contracts to provide the service. It escapes me how GSA or any other governmental agency can come to that agency, that public utility, and say to it, "You're going to have to do something more for us than you do for anybody else."

I don't understand how we, this Congress, have any kind of authority, other than a persuasional authority, to insist that those utilities do what they do not routinely do, enter into a written contract, or do what they do not routinely do, which is to vary, basically, the basis upon which they provide services to other persons and other entities to satisfy the requirements of this Government.

Now, I have sat here and thought of one way that we can arrange a nexus, if you will, between the United States and utilities by which we could require them to enter into something like this, and that would be a power company that utilizes preference power, power generated through Federal facilities if we wanted to amend the Preference Power Act to require that utilities using federally generated power would have to agree with Federal agencies to which it supplies the power that they would adhere to something like this.

But aside from that, I see no way, other than, as Mr. Hopf has stated, simple persuasion for GSA or any other agency to insist that a franchised, certificated utility enter into a contract with

them or agree to this particular program, which I, individually, and as a member of this committee, certainly support, but as I said, unless I am missing something, Mr. Chairman, I don't understand how GSA, in dealing with franchised utilities, can do anything more than they have been doing.

Chairman LAFALCE. It seems to me that, in my judgment, they could have gone into court and obtained a mandatory injunction compelling the utilities to come forth with a plan; that the utility's failure to come forth with a plan, therefore, would have been justification for being held in contempt of court.

Mr. RHODES. If the chairman would yield—

Chairman LAFALCE. This is what I had in mind when I sought out any legal memorandum they must have had. If somebody is violating the law, there are legal recourses available, and it seems to me that there wasn't that arduous desire on the part of GSA to see to it that the law was complied with, which is why we are having the hearings today.

Mr. RHODES. Without us getting into the potential merits or lack of merit of a legal question and the potential outcome of a lawsuit—

Chairman LAFALCE. The point is, we have a ruling from the Justice Department; we have a ruling from GAO. The law is not in doubt here. The law is not in doubt.

Mr. RHODES. The applicability of the law, I think, is very much in doubt.

Chairman LAFALCE. I will try to call on the members in the order in which I think they came, so Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. I just have one question following your line of questioning, which I thought was very good.

I have had the opportunity—I guess it was in 1985—to participate in oversight hearings involving the Navy, I think, in San Diego. It was in southern California.

This same question, to some extent, only directed more to the compliance for minority businesses in terms of procurement of contracts through the Navy. I went also to participate in a hearing in the Raleigh/Durham area of North Carolina.

I am somewhat bothered that some of the questions that have come up—where you raised through your communication—find these problems still unresolved in 1988.

I would like to ask the Navy and the General Services Administration, do you have any kind of procedure for monitoring compliance with the statutes that we talked about when it comes to procurement of contracts for small business? Why did these utility companies—I guess they cut off your service if you press it. Is that the problem? Do we have any way of knowing? Why did we have to wait until it was called to your attention by the committee? Did you know that these kinds of things existed?

Mr. HOPF. That is certainly a potential problem, sir, in trying to negotiate a contract with public utilities. They refuse to enter into that contract and if, by law, they are permitted not to provide us the service under the normal tariff arrangements, then we face the possibility of the lights going out or not otherwise getting the service. It becomes a particularly difficult problem when they are man-

dated by statute, as they are in certain instances, as a sole-source supply for the Government.

Mr. HAYES. Are you saying that the Government is in the same position as I am? If I don't pay my bill, I get my lights cut off. Is that what you are saying?

Mr. HOPF. That could be an analogous situation, sir, yes.

Mr. HAYES. All right.

What is your response to it?

Mr. HOPF. To that situation?

Mr. HAYES. Yes; how do we correct it?

Mr. HOPF. It is obviously the one that has led GSA into the dilemma. We know what the law's requirements are. We are not ignorant of it, and our contracting officers and Mr. Brian Polly's program do their best to attain compliance with it, but when push comes to shove, you can lead the horse to water, but you can't make him drink.

When you are dealing with a sole source of supply, it is a difficult situation. It is one that I think even the Department of Justice recognized. When reading their opinion, they noted in it that, "We express no opinion on whether any particular State law actually requires the delivery of service to a customer who places additional conditions on the receipt of that service. If the State law does not require the acceptance of such additional conditions, the utility may be excused from the provision of service."

That is what we are trying to work out right now with the Department of Justice to find out where does that lead us.

Chairman LAFALCE. What are you talking about, State law? What relevance is the State law insofar as Public Law 95-507 is concerned?

Mr. HOPF. The Federal law applies to contracting officers and it requires them to put a clause into certain contracts. The law does not require any particular vendor to enter into a contract with the Government, and that is the crux of the matter.

Chairman LAFALCE. This obligation is with respect to anybody entering into a contract with the Government. This is something that the law says must be entered into by two parties. It is the Government, and then it is the entity contracting with the Government. It takes two to tango.

Mr. HOPF. Yes, sir.

Chairman LAFALCE. So, this law is applicable to any governmental agency and anybody entering into a contract with a governmental agency.

Mr. HOPF. Yes, sir; but again, sir, that is the difficulty. Once they enter into a contract, we are in a different environment than trying to get them into it in the first place. The question is whether you can obtain an affirmative injunction or writ of mandamus to direct any particular company to enter into a contract with the Government under those specified conditions.

That is the issue we are trying to work out right now with the Department of Justice, to see how far this legal opinion can be taken.

Chairman LAFALCE. I notice that that recommendation has also been called for in the testimony of GAO. On page 7, they say, "The most realistic remedy available to the Government in cases where

there is no formal contract is to seek judicial enforcement of the subcontracting plan requirements by obtaining an injunctive order enjoining the utility from failing or refusing to comply with the statutory requirements."

I refer you to page 7.

Mr. HOPF. Yes, sir.

Mr. HAYES. Mr. Chairman, I would like to yield any balance of time I may have to my colleague from Michigan, who has some other pressing problem he has to go to.

Mr. CONYERS. Thank you, Mr. Hayes. I appreciate this.

Mr. Chairman, I think we owe you a debt of gratitude for continuing these hearings. I notice the original letter went out to GAO from a previous chairman, but this has been very revealing for me as a new member of the committee.

What I would like to find—and we were talking with some of the GSA people yesterday—is what is it about compliance to small business and minority business requirements in the law that are so onerous? We are making every reasonable exception, it seems to me, that can be made, and yet, it seems that they don't want to associate, or get involved with small business people, or they don't want to let minority business people in the door. I am trying to get to this reason for the resistance.

These laws were passed in 1978 and oversighted by the committee year after year. I see nothing left for us to do but to continue to put far more pressure on them than I ever thought was going to be necessary.

It seems like reasonable people could read the handwriting on the wall. Here we have monopoly utilities actually thumbing their nose at the Congress and at the Federal law. I must say that it seems to me that some of the agencies have not been as forceful as I would have liked.

The Navy, and some of our Government agencies, could have put a little bit more heat on it. It is this committee coming to our Government agencies and forcing them to insist upon more compliance with utilities and others in the private sector.

It seems to me that we not only have to resort to far more drastic solutions than I have thought would be required, but I think that the oversight is going to have to continue almost apace, Mr. Chairman. I mean, it looks like we must all call him up every 6 months and go through this thing. This is becoming a major embarrassment, particularly as minority businessmen begin to realize how far they have been shut behind the door, and for how long this has been going on, and how blatant it is. I mean, in violation of law.

We pile law upon law and are complained against for that, but the fact of the matter is that none of the law, or very little of it, is being honored. So, I see a great role for us here to move this forward as quickly as possible.

Chairman LAFALCE. This is why we have to, at the appropriate time, begin questioning them on remedies and incentives.

Mr. CONYERS. It is an unbelievable situation, and I thank my colleague from Illinois for letting me interrupt his presentation.

Thank you.

Chairman LAFALCE. That is a long, balanced 5 minutes, but we will go now to Mr. Mfume.

Mr. CONYERS. Is there any, though, Mr. Chairman, response from any of the witnesses about anything that I have said.

Mr. POLLY. Mr. Chairman, if I may, I think the big thing that I would at least like to put forth on the floor right now is the fact that we at GSA are diligently working with the commissions of the various States, with the Edison Institute, continually trying to use persuasive educational means to try to get all of the utility companies to move in the direction of guaranteeing a great amount of their business to go to small and small disadvantaged businesses.

We have, I feel, done extremely well in the last 5 years, not saying we have a perfect record; we have a long way to go.

What I am concerned about is, in talking to the Justice Department—

Chairman LAFALCE. I do want to point out—

Mr. POLLY. I am sorry, sir.

Chairman LAFALCE [continuing]. In comparing GSA's record of compliance, according to the GAO audit and NAVAIR's, I think GSA had plans in all but maybe 2 percent. Is this correct?

Mr. POLLY. I am looking at utilities only, sir. I am sorry.

Chairman LAFALCE. I am not looking at utilities only. I am saying NAVAIR had it at about 30-some percent.

My primary concern with GSA is not in the aggregate. It is with utilities, and that is why I sent the letter to them in June 1987. I sent a letter to GAO in June 1987, asking that GAO expand their investigation that Parren had requested to look specifically at utilities with respect to GSA.

My concern with GSA is primarily utilities.

Mr. POLLY. Understood. So, basically, we have done an awful lot, sir, to try and get the various utility companies to comply with the law. The thing that I am really concerned about, again, and it was expressed by Mr. Hayes a little while ago, was the fact that we have, on occasion, been cut off as far as the lights going out when a bill hasn't been paid.

We are responsible for 2,000 buildings throughout the United States. We want to make sure that the Government continues to keep working. Toward this end, we are doing everything possible. We have talked to the Department of Justice and they are—

Chairman LAFALCE. Let's cut through this right now.

Mr. POLLY. Yes, sir.

Chairman LAFALCE. I want a list of every single utility with which you do not—

Mr. POLLY. We have provided that, sir.

Chairman LAFALCE. OK, you have that?

Mr. POLLY. Yes, sir; there are 25 total. We have provided that to you.

Chairman LAFALCE. OK, that you don't have plans with right now.

Mr. POLLY. That is correct, that we have been working with to try and get plans, yes, sir.

Chairman LAFALCE. OK. Do we have that?

Mr. STEVENS. These are appended to our statement, Mr. Chairman. It is a list of 23. Asterisks are besides the names of 10 of

those companies which specifically cite the subcontracting plan requirements as their reason for refusing to sign a contract with GSA.

Chairman LAFALCE. All right. I want to name them for the record. We want to make sure everybody is aware of this.

The Alaska Electric Light & Power Co., Juneau, AK; the Department of Public Works, Arlington, VA; the Department of Public Utilities, Newport News, VA; the Cleveland Electric Illuminating Co., Cleveland, OH; the East Ohio Gas Co., Cleveland, OH; the Florida Power & Light Co., Miami, FL; the Long Island Lighting Co., Patchogue, NY; the Oklahoma Electric Co., Oklahoma City, OK; the Potomac Electric Power Co., Washington, DC; the San Diego Gas & Electric Co., San Diego, CA; the Tucson Electric Power Co., Tucson, AZ; the Washington Suburban Sanitary Commission, Hyattsville, MD; the Arkansas Power & Light Co., Little Rock, AR; the Baltimore Gas & Electric Co., Baltimore, MD; the Consolidated Edison Co. of New York, Inc., New York City; the Consumers Power Co., Jackson, MI; the Florida Power Corp., St. Petersburg, FL; the Louisville Gas & Electric Co., Louisville, KY; the New Orleans Public Service, Inc., New Orleans, LA; the Public Service Co. of North Carolina, Gastonia, NC; the Memphis Light, Gas & Water Division, Memphis, TN; the Kentucky-American Water Co., Lexington, KY; and the Johnson City Power Board, Johnson City, TN. Just so that we are all aware.

I would think it probably would behoove the members of the Small Business Committee if we were in contact with these companies directly, and I think it would also behoove us if we were in contact with the Members of the House and the Members of the Senate that have these companies in their districts and ask them to join with us in a friendly letter. I think we would be remiss, too, if we tried to hide what we are doing, so perhaps we ought to bring it to the attention of the local media in those areas.

Mr. CONYERS. Mr. Chairman, that is an excellent idea. We have not even mentioned—and I am sorry that I won't be able to bring it up in the next round of questioning—the FTS 2000 system, which apparently was very lax in bringing up the small business—

Chairman LAFALCE. Let me come back to you, John. Let me go to Congressman Mfume so he can get his 5 minutes.

Mr. MFUME. Thank you very much, Mr. Chairman.

Let me preface my remarks also by commending you for holding this hearing. This is an issue that, given all that is happening in the news with the scandal brewing over at the Pentagon involving procurement and a general lack of confidence, I think that, unfortunately, too many Americans have, with the operation of our Government. I think these hearings are in line and are timely, and I regret that they are necessary at all, but I welcome the opportunity to participate. I thank the gentlemen who have given testimony this morning.

Mr. Chairman, I would like to follow up on a point that you made early on, because I am still at a loss, very much at a loss, and maybe some of you can help me. I don't like plowing over old ground, but I need to go back through this for my own education.

I am just at a loss as to why there are so many contracting officers who are ultimately responsible for ensuring that subcontracting plans are submitted when required to do so are failing to do that.

Vice Admiral Wilkinson, you said that you were going to take appropriate action to make sure that the contracting officers comply. I have to share the chairman's frustration as to why, even if it were in the form of a directive or memorandum to be issued to a contracting officer that said, "Look, from this day forward, make sure that any company you're dealing with has a subcontracting plan," that that would be so grossly misunderstood. Someone said that training was the greatest problem and the turnover was 22 percent. But even if turnover was 44 percent, if there is a directive that says, "From this point forward, we will comply with the law that says X, Y and Z."

I really don't understand it. I think every contracting officer who has been told that and fails to do it ought to be fired, because they do a disservice to the people they serve; they do a disservice to this Nation; they do not serve the President well, or the Congress, or anyone else who has the slightest concern about what is happening as it relates to subcontracting.

I think we ought to be very firm with that, and so the action that you are talking about, I hope is a very strong disciplinary action, because I don't believe we can afford really to tolerate anything else or anything less, for that matter.

It is interesting that the GAO report indicated that when subcontracting plans were in effect, that the three agencies reviewed generally were achieving what they were trying to do. The problem is that in half of the cases, they were never there, and so, we are losing a tremendous opportunity, I think, to be effective.

What we do in the process is to hurt small businesses and disadvantaged businesses and to hurt our own public interests and image.

I need to know from GSA, if I could, Mr. Chairman, as the report indicates, why, in fact, there was no use of remedial action by GSA, Energy, and the Navy, against contractors when subcontracting goals were not achieved. I am not talking about utilities now, but when those goals were not achieved.

Is there any reason why you did not put into practice any sort of remedial action, and why there were no incentive clauses also?

Mr. HOFF. Speaking for GSA, sir, we did not terminate any contracts for default in fiscal year 1987 for a contractor's failure to meet goals. To try to give you some generalized answer as to why that did not occur, I really can't do it. However, I am not aware of any particular cases which required such action. From a random survey that we did last week in talking to a variety of GSA contracting officers throughout the agency, the consensus was that in the vast majority of cases, contractors are substantially meeting their goals or exceeding their goals.

That is not to say that there aren't cases out there—hopefully very few cases—where that hasn't occurred. The only other thing I might point out is the Small Business Administration's annual report for fiscal year 1987. One of the things that SBA is charged with doing is reviewing contractor compliance, and I noted in the

report that SBA conducted 5,827 contract reviews at various sites of major Federal prime contractors to determine compliance, and the conclusion there was that a total of two noncompliance determinations resulted. I would assume from that, what they found is that in the vast majority of cases, the contractors, once having negotiated these goals, are using their best efforts to achieve them, and there is no basis for a negative determination.

Mr. MFUME. What about the failure to use incentive clauses as a means of increasing subcontracting opportunities?

Mr. HOFF. In GSA, we haven't used them. They are permissive. Number one, we really haven't felt the need to use them. We have been fairly successful in achieving our goals.

There is a note from the GAO report that on the vast majority of cases, we have obtained the plans as we should. There are only a few cases where we didn't get them in the first place, and that wasn't a result of somebody just ignoring the requirements of the law. It was simply a miscalculation as to how you determine contract value in a multiyear contract.

Incentive clauses as a whole in GSA, we haven't had very good experiences with them, not in the subcontracting arena, but in other areas. We found that we don't get much effectiveness out of the incentive clauses, and sometimes we end up paying something and not really getting anything in return for them.

It is not a type of clause that we are anxious to get into unless we really find that it is necessary, and we need cases to achieve our goals. So far, we haven't had that problem.

Mr. MFUME. What do you suggest that we do with contracting officers who don't do their job, who violate the law, who skirt congressional directives such as this?

Mr. HOFF. I think you have to look at them on a case-by-case basis, sir. I am sure there may be situations out there where a Federal employee knows darned well what the law is and thumbs his nose at it. If that is the case, then we should be taking strict disciplinary action.

But I suspect that, at least from the evidence that we have in the GSA case, that it is not really a question of contracting officers ignoring the law, intentionally ignoring the law. They make mistakes.

In our case, they made a mistake as to how you calculate the contract value in a multiyear contract. That is not something that we feel that a disciplinary action is appropriate for, although we need to take strong measures to make sure that they understand it in the future. That we have done.

Our people make mistakes. There is no question about it. I make about 50 myself every day. The complexity of the procurement process is such that those things are going to occur.

Mr. MFUME. Excuse me if I am a little mistaken, but again, the chairman—and I have to go back to this—made a very clear point that there should not be a lot of confusion in the mind of any procurement officer who is told that you should require of any prime contractor some sort of subcontracting goal. Where is the confusion here?

Mr. HOFF. In our specific case, sir?

Mr. MFUME. In the cases that you cited.

Mr. HOPF. In GSA's situation, the problem was—and this has occurred not just in the Public Law 95-507 area, but with respect to other procurement requirements and their application to contracts at certain dollar thresholds—the problem is that we have certain contracts that are technically multiyear contracts. In other words, we have wrapped up a number of annual years' requirement into one document, a multiyear contract.

In that case, there has always been a question in some people's mind as to whether you annualize the dollar value for purposes of applying certain procurement requirements or you take the contract value as a whole for the entire—in this case—3 years of the contract requirement.

A similar situation where you have contracts with options, and that has been, candidly, a point of confusion in GSA in the past. We felt we had cleared it up pretty much, but apparently we did not in these very few cases that GAO found.

Mr. MFUME. I would hope we are not annualizing it, because if that is the case, a whole lot of people will get left out.

Mr. HOPF. No, sir; you are definitely correct. We should not be annualizing it, and in the vast majority of cases, we are not. It is the entirety of the contract value, even if it is a multiyear contract, even if it is a contract with options.

Mr. MFUME. OK.

I know I don't have a lot of time left, Mr. Chairman, but I think this gentleman wanted to say something.

Mr. DEPROSPERO. I am Lou DeProspero. I just wanted to say also that after we received the report, we did issue a, what we call PIP, procurement information publication, that we get out to all of our contracting officers that informs them on how they should make the calculations. We think that we covered that one loop.

Chairman LAFALCE. May we have that submitted for the record, please.

[The information may be found in the appendix.]

Mr. MFUME. Quickly, if I might turn my attention to the problem that we are having with the utilities. Can we, as a committee, or should we expect that there will be legal actions, since you apparently discussed it, although you have not written it down, in the form of a lawsuit against the utilities that do not comply? Can we anticipate that will be an action taken by you?

Mr. HOPF. I would say, sir, that it is probably premature to conclude that GSA is going to file suit on the basis of that Department of Justice memorandum. As I indicated, the memorandum is not a panacea for our problem. It simply says that in those cases where we enter into a very informal arrangement with a public utility to receive a service the same way a private citizen receives a service, that the requirements of the law are read in, notwithstanding the fact that was not part of the agreement between the parties or the understanding when they entered into that relationship.

Chairman LAFALCE. Yes; but they are refusing to enter into a written contract with you.

Mr. HOPF. Yes, sir.

Chairman LAFALCE. They are refusing to enter into a written contract with you for this reason in particular. What are they saying? What is their justification? Are they saying the law is

unfair, therefore, we don't want to abide by it? Are they saying that we are exempt from the law? Are they saying that it is too difficult to comply with? What are the practical reasons?

Mr. HOPF. I am not a public utility expert, sir, and I certainly don't want to speak for the public utility industry, but some of the reasons that I have seen, range anywhere from the reporting requirements under the law are burdensome to them, difficulty—when they provide service, they provide service in a particular fashion which is dictated by the State licensing body and that we are asking them to depart from that.

I am not making their arguments—

Chairman LAFALCE. No; I know this is not your argument. I know that you are stating some of the arguments. I just find those arguments mind-boggling for public utilities. They should be ashamed to make those arguments if they make those arguments.

Mr. MFUME. Mr. Chairman, if I could just reclaim the last moment of my time—

Chairman LAFALCE. Yes.

Mr. MFUME. This list of utilities that failed to comply is interesting, and what is even more interesting for me is that Baltimore Gas & Electric Co.—

Chairman LAFALCE. I thought you might find that interesting.

Mr. MFUME. You have put an asterisk besides those that objected in whole or in part because of the requirement for subcontracting for small and disadvantaged businesses. They don't have an asterisk, thank God for that, but they are on the list anyway.

If you know specifically, and if you don't, maybe you can just talk around it, but could you give me an idea of why they have decided that they didn't want to comply with the law in this regard?

Mr. POLLY. I am afraid I really can't answer that at this time, sir.

Mr. MFUME. Could you get the information?

Mr. POLLY. I will definitely do that and submit it for the record; yes, sir.

Mr. MFUME. OK. Thank you.

[The information may be found in the appendix.]

Mr. MFUME. Mr. Chairman, I thank you. My time has expired.

Chairman LAFALCE. Since there are no further questions by members of the committee at this time, although I have a great many—we also have a bill on the floor very shortly, SBA authorization bill, and I want time to prepare for it.

To NAVAIR, you should be very grateful that GSA was at the table with you today. You owe them a great debt. In all candor, the problem with public utilities is a serious one. But NAVAIR's compliance, at least in the past, according to the GAO evaluation, was not 10 times worse, but 15 times worse than GSA's. GSA's 2 percent noncompliance really wasn't that bad and our primary concern here really was with NAVAIR. I don't want you to think because we spent most of our time questioning GSA that you should go back and say, "It wasn't too bad," or "They weren't that serious about us."

No; we are very serious. Your record was the worst record in general. In GSA, we had a particular problem, public utilities, that we are extremely concerned about because there it sounds like a

deliberate violation of the law by utilities with the acquiescence of GSA, reluctant as their acquiescence may have been.

With NAVAIR, it wasn't premeditated, but it looks as if it was pretty gross negligence in the past and, hopefully, you have taken steps that will remedy it. We will be looking over your shoulder.

We probably should have a little official reconvening sometime in the future, so we will give you a date when we can get together in this year, and see if what you have promised is really holding up. You can look forward to having some discussions with us in 3 or 4 months or so, I would assume.

Thank you. The committee adjourns.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

OPENING STATEMENT
JOSEPH M. MCDADE
RANKING MINORITY MEMBER
FULL COMMITTEE HEARING ON SUBCONTRACTING
JULY 6, 1988

I WOULD LIKE TO THANK YOU, MR. CHAIRMAN, FOR HOLDING THESE HEARINGS TODAY ON SUBCONTRACTING, SECTION 211 UNDER PL 95-507. THIS SECTION REQUIRES ALL FEDERAL CONTRACTS THAT EXCEED \$500,000 TO CONTAIN A SUBCONTRACTING PLAN FOR SMALL AND DISADVANTAGED BUSINESSES.

I AM LOOKING FORWARD TO HEARING FROM THE WITNESSES TODAY FROM THE GENERAL SERVICES ADMINISTRATION, NAVAL AIR SYSTEMS COMMAND AND NAVAL SEA SYSTEMS COMMAND. THE GAO HAS PUBLISHED A REPORT ON SUBCONTRACTING REQUIREMENTS AT GSA, ENERGY AND NAVY, AND I AM LOOKING FORWARD TO REVIEWING THE RESULTS OF THIS INVESTIGATION. SUBCONTRACTING REPRESENTS AN IMPORTANT OPPORTUNITY FOR SMALL BUSINESS TO PARTICIPATE TO A GREATER EXTENT IN THE PROVISION OF GOODS AND SERVICES NEEDED BY THE FEDERAL GOVERNMENT. I HOPE THESE HEARINGS WILL ALERT US TO THE PROBLEMS IN SUBCONTRACTING AND ENABLE US TO RECTIFY THEM.

THANK YOU.

Statement of
Congressman Esteban E. Torres
before the
Committee on Small Business
July 7, 1988

I want thank Chairman LaFalce for holding this important hearing on compliance with federal small business subcontracting requirments. I also want to thank the witnesses for taking the time to join us today. Their testimony should help the Committee gain a better understanding of the problems that are plaguing the small business subcontracting program.

As you know, I have been critical of past efforts by federal agencies to implement the subcontracting law. As the GAO has reported, compliance with Section 11 of Public Law 95-507 has been uneven, and in the case of utility contracts appalling. Clearly, something must be done to increase compliance with the subcontracting program. I am anxious to hear the suggestions of our witnesses in this regard.

I strongly believe that compliance will not be significantly increased unless enforcement of the subcontracting law is strengthened. Incentives simply have not worked and I believe it is time to invoke measured penalties for gross noncompliance.

As you know, Mr. Chairman, the Committee adopted a provision in the 8(a) reform bill I authored which would require a liquidated damages provision in all contracts subject to the subcontracting requirements. The Senate has also seen fit to include such a provision in its reform legislation. While the Senate version is slightly different, I am confident that with the Chairman's support and assistance, an agreement will ultimately be reached and meaningful subcontracting reform will be enacted.

STATEMENT OF REP. JOHN CONYERS, MEMBER
COMMITTEE ON SMALL BUSINESS

HEARING ON THE SMALL BUSINESS SUBCONTRACTING PROGRAM

July 6, 1988

Clearly the intent of this committee and Congress in passing Public Law #95-507 was to expand the opportunities for competition for government contracts and subcontracts and thereby make lower priced services available to the U.S. government. It is also obvious, that in order to increase competition opportunities, it is necessary to involve those persons and companies who have been economically disinfranchised. This in short means, opportunities for competition from among small and small and disadvantaged businesses.

As a member of this committee, it is appalling to recognize that the intent of Congress can be and has been completely frustrated by the illegal and/or inappropriate consort of certain government contractors and government employees. For example, Texas Utilities Company, Houston

Lighting and Power Company, and Central Power and Light Company (C P & L), all public utilities in Texas, have contracts with GSA which contains "minority inferiority" language which is intended to justify excluding small and disadvantaged businesses from their fuel and power procurement subcontracting activities (see cited contracts on page 6 & 7).

As the attached "Sales and Expense Percentages" indicates, these three (3) companies expend approximately forty percent (40%) of their annual revenues in fuel and power procurement. Thus, with the acceptance of these "minority inferiority" claims, GSA and SBA has effectively prohibited small and disadvantaged business from participating in an economically preferred aspect of the utility industry.

To express my concern for the "inferiority" implication indicated in the above referenced public utility company subcontracting plans, I personally called this matter to the attention of the administrators of the General Services Administration (GSA) and the Small Business Administration (SBA) in a letter dated August 11, 1987 (attached). The administrators' (GSA and SBA) reply to my inquiry failed to comment as to the extent that existing federal contracts include such negative, unsupported claims of "minority

inferiority". Each response (ie. GSA and SBA) simply reflected their position relative to one company (C P & L), and attempted to justify the inclusion of unvalidated claims of inferiority.

In their subcontract plans, the above referenced companies reflected their clear intent not to provide small and disadvantaged business "the maximum practical opportunity" as required by Public Law #95-507. Thus, these companies overtly thumbed their noses at the requirements of Congress. Although this committee should consider these acts by big business a serious matter, it is even more serious to recognize that GSA and SBA, (the agencies with responsibility for administering the government subcontract plans) accepted and thereby sanctioned the "minority inferiority" claims included in the government subcontracts. Thus, these agencies imply that the U.S. government supports a claim of "minority inferiority" as a means of avoiding and otherwise circumventing the clear intent of the U.S. Congress.

Given GSA and SBA's response to my inquiry, I suggest that a critical examination of GSA's contracting procedures would reveal other government contracts that have similar unacceptable "minority inferiority" assertions.

Thus, this committee should require GSA and SBA to determine the number of utility subcontracting plans that contain such inappropriate language. Upon the completion of that evaluation, GSA should report to this committee as to actions that are to be taken in order to remedy this situation in any existing and future government contracts. Further, since GSA has a legal opinion from the Justice Department, this committee should request GSA to pursue aggressive legal actions against firms that would use such language and other inappropriate acts in order to overtly circumvent their obligations under federal law.

From the prospective of this congressman, this type of language in any federal contract is completely unacceptable. It is also unacceptable, that the agencies given the responsibility to administer these contracts and to ensure that small and disadvantaged business have "the maximum practicable opportunity", would support positions that would prevent a real economic opportunity from being realized.

Thus, I agree, with the chairman, the time for excuses has ended.

CONTRACTSHOUSTON LIGHTING & POWER COMPANY

Contract #GS-00B-02343

From: January 1, 1984

To: December 31, 1993

By: Larry L. Moreau
Director, Public Utilities Services Division
Office of Public Utilities
Public Buildings Service
GENERAL SERVICES ADMINISTRATION
(Contracting Officer)

By: A. D. Maddox
V. P. Customer Relations
HOUSTON LIGHTING & POWER COMPANY
(Contractor)

CENTRAL POWER & LIGHT

Contract #GS-00T-42002

From: March 14, 1979

To: March 13, 1989

By: Larry L. Moreau
Director, Public Utilities Services Division
Office of Public Utilities
Public Buildings Service
GENERAL SERVICES ADMINISTRATION
(Contracting Officer)

By: W. C. Price
Vice President
CENTRAL POWER AND LIGHT COMPANY
(Contractor)

TEXAS UTILITIES ELECTRIC COMPANY

Contract #GS-00B-02320

From: January 15, 1984

To: January 14, 1994

By: Larry L. Moreau
Director, Public Utilities Services Division
Office of Public Utilities
Public Buildings Service
GENERAL SERVICES ADMINISTRATION
(Contracting Officer)

By: F. D. Scarth
Vice President
TEXAS UTILITIES ELECTRIC COMPANY
(Contractor)

JOHN CONYERS, JR.
1ST DISTRICT, MICHIGAN

COMMITTEE
JUDICIARY
CHAIRMAN
SUBCOMMITTEE ON
CRIMINAL JUSTICE
GOVERNMENT OPERATIONS
SMALL BUSINESS

Congress of the United States
House of Representatives
Washington, DC 20515

August 17, 1987

WASHINGTON OFFICE
2013 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE 202-225-5128

DETROIT OFFICE
805 FEDERAL BUILDING
231 W. LAFAYETTE
DETROIT, MI 48226
PHONE 313-981-6670

RECEIVED AUG 21 1987

Hon. James Abdnor
Administrator
Small Business Administration
1111 18th Street, N.W.
Washington, D.C. 20416

Dear Mr. Abdnor:

I write this letter to express my concern about some of the language contained in a subcontracting plan approved by your agency. On page 3, the subcontracting plan which is attached to this letter makes the following statements:

It is very unlikely that any small or small disadvantaged business would be able to meet the financial and reliability standards that are required by the public interest in the area of providing fuel or power.

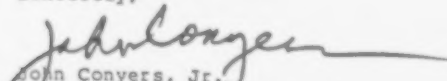
Transmission lines and power plants require highly technical and specialized skills and because of this fact, they have been omitted from this plan.

Since the Small Business Act is intended to assure minority participation in federal contracts, it is obvious that these unsupported negative comments undermine the clearly stated requirements of the law and perpetuate the concept of minority inferiority.

Moreover, it is my understanding that such comments are common in public utility service contracts presented to, and approved by, the General Services Administration and the Small Business Administration. The inclusion of such assertions in federal contracts effectively restricts minority participation based solely on the grounds of minority status.

I would greatly appreciate your comments as to your agency's acceptance of implicit assertions of minority inferiority in subcontracting plans. I look forward to hearing from you.

Sincerely,


John Conyers, Jr.
Member of Congress

JOHN CONYERS, JR.
1ST DISTRICT, MICHIGAN

COMMITTEE
JUDICIARY
CHAIRMAN
SUBCOMMITTEE ON
CRIMINAL JUSTICE
GOVERNMENT OPERATIONS
SMALL BUSINESS

Congress of the United States
House of Representatives
Washington, DC 20515

August 11, 1987

WASHINGTON OFFICE
2313 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE 202-225-8126

DETROIT OFFICE
609 FEDERAL BUILDING
231 W. LAFAYETTE
DETROIT, MI 48226
PHONE 313-861-8870

Hon. Terrence Golden
Administrator
General Services Administration
18th and F Streets, N.W.
Suite 6137
Washington, D.C. 20405

Dear Mr. Golden:

I write this letter to express my concern about some of the language contained in a subcontracting plan approved by your agency. On page 3, the subcontracting plan which is attached to this letter makes the following statements:

It is very unlikely that any small or small disadvantaged business would be able to meet the financial and reliability standards that are required by the public interest in the area of providing fuel or power.

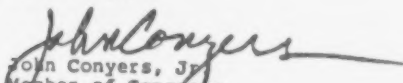
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Moreover, it is my understanding that such comments are common in public utility service contracts presented to, and approved by, the General Services Administration and the Small Business Administration. The inclusion of such assertions in federal contracts effectively restricts minority participation based solely on the grounds of minority status.

I would greatly appreciate your comments as to your agency's acceptance of implicit assertions of minority inferiority in subcontracting plans. I look forward to hearing from you.

Sincerely,


John Conyers, Jr.
Member of Congress

SALES AND EXPENSE PERCENTAGES

	1987 OPERATING REVENUE			1986 OPERATING REVENUE		
	RESIDENTIAL	NONRESIDENTIAL	PERCENT	RESIDENTIAL	NONRESIDENTIAL	PERCENT
TEXAS UTILITIES	\$1,403,446,000	\$2,479,477,000	60.73%	\$4,082,923,000	\$1,530,258,000	61.08%
COMPANY SYSTEM*	857,000,000	1,579,000,000	64.82%	2,436,000,000	885,000,000	65.36%
CENTRAL AND SOUTH					1,670,000,000	
WEST COMP**					2,500,221,000	
HOUSTON POWER	1,244,002,000	2,289,362,000	64.79%	3,533,564,000	1,174,335,000	66.04%
AND LIGHT**						
TOTALS	\$3,704,448,000	\$6,347,039,000	63.15%	\$10,052,207,000	\$3,589,593,000	64.67%
					\$6,572,008,000	\$10,161,601,000

	1987		1986		1987		1986	
	OPERATING EXPENSE	FUEL AND	OPERATING EXPENSE	FUEL AND	NONRESIDENTIAL	SMALL AND	NONRESIDENTIAL	SMALL AND
TEXAS UTILITIES	PURCHASED POWER		PURCHASED POWER		PURCHASED POWER	DISADVANTAGED	PURCHASED POWER	DISADVANTAGED
COMPANY SYSTEM	\$1,385,610,000		\$1,479,213,000		\$962,909,055	SHARE OF PURCHASES	\$898,296,297	SHARE OF PURCHASES
CENTRAL AND SOUTH	938,000,000		1,079,000,000		608,005,747	60,800,575	699,401,067	69,940,107
WEST COMP								
HOUSTON POWER***	1,410,701,794		1,420,967,616		914,031,007	91,403,181	920,683,310	92,066,331
AND LIGHT								
TOTALS	\$3,934,311,794		\$3,979,180,616		\$2,484,946,608	\$2,518,380,674	\$248,494,661	\$251,038,067

ASSUMPTIONS

- 1) NONRESIDENTIAL SALES ARE SALES SUBJECT TO DIRECT GOVERNMENT AND GOVERNMENT SUBCONTRACTING
- 2) NONRESIDENTIAL PURCHASES ARE THEREFORE SUBJECT TO DIRECT GOVERNMENT SALE AND GOVERNMENT SUBCONTRACTING REGULATIONS
- 3) SMALL AND DISADVANTAGED BUSINESSES CONTRACTED FOR MINIMUM OF 10% OF NONRESIDENTIAL PURCHASES
- 4) INDUSTRY AVERAGE PROFIT MARGIN IS 10%
- 5) DIRECT DAMAGES FROM FAILURE TO COMPLY WITH FAR AND PL 95-507 ARE 10% OF SMALL BUSINESS SHARE OF MARKET OR \$24,849,466 FOR 1987 AND \$25,183,007 FOR 1986
- 6) CENTRAL POWER AND LIGHT EQUALS APPROXIMATELY 34% OF THE FIGURES SHOWN FOR THE CONSOLIDATED CENTRAL AND SOUTHWEST AS CALCULATED USING 1985 SALES FIGURES

*DATA FROM COMPANY'S ANNUAL REPORT

**1985 DATA FROM HOODY'S PUBLIC UTILITY MANUAL

***CALCULATED USING AVERAGE PERCENT OF TU AND CSWC

STATEMENT OF REP. KWEISI MFUME, MEMBER
COMMITTEE ON SMALL BUSINESS

HEARING ON THE SMALL BUSINESS SUBCONTRACTING PROGRAM

July 6, 1988

The 1988 Business Week top 1000, lists 84 electric utilities and 24 natural gas distribution companies. According to Business Week, total sales for these companies exceed \$187,253,000,000. The top 84 electric utilities generate more than \$144,884,000,000 in electricity sales (See "Utility Industry Top 108 Companies", attached). The Defense Department purchases more than one and a half billion dollars (\$1,500,000,000) of electricity to serve various Air Force, Navy and Army bases (See "United States Armed Service Power Consumption", attached). Clearly, the nation's public utilities are contractors to the U.S. government and subject to the compliance requirements of the Small Business Act (SBA).

A comparison of the Business Week data with information from the annual reports from selected electric utility companies, suggests that fuel and power costs for the top 84 electric utilities approaches 60

billion dollars (\$60,000,000,000) annually (See "Utility Industry Top 108 Companies", attached). Since this fuel and power is purchased from non-company-owned suppliers, almost forty percent (40%) of the electric utility industry sales revenue is used to purchase supplies from fuel and power subcontractors. These fuel and power subcontractors are also subject to the flow-down requirements of the SBA. By this forty percent (40%) rationale, fuel and power electricity subcontracting for the U.S. Armed Forces facilities, should exceed six hundred million dollars (\$600,000,000.) annually. Considering the requirements of the SBA and the Federal Acquisition Regulations (FAR), small, independent and disadvantaged businesses should have a reasonable and equitable opportunity to compete for at least the U.S. government generated energy subcontracts.

However, in recent responses to the inquiries from the Honorable Mickey LeLand, Howard M. Metzenbaum, and myself, Chairman Hesse of the Federal Energy Regulatory Commission (FERC or Commission), demonstrates that the Commission, knowingly frustrates small and disadvantaged subcontract requirements of the SBA and FAR. Since FERC has the primary responsibility for regulating, certifying and approving energy related contracts and subcontracts,

it is reasonable to expect that FERC would be sensitive to those contracts that are proposed for its approval that are not in compliance with federal law.

As the attached letters indicate, FERC is very aware of the requirements of Public Law #95-507, and FERC is also aware, that the companies they regulate (natural gas pipelines), sell natural gas to government contractors like electric utilities. FERC is not unaware that FAR defines a subcontract to mean "any agreement (other than one involving an employer/employee relationship) entered into by federal government prime contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract". This includes agreements subject to FERC's approval.

Efforts to convince the Commission of the necessity to include the requirements of the SBA and the FAR in the government contracts and subcontracts that it approves, has been dismissed by FERC. As an example, in the response to Members of Congress, Chairman Hesse states that "moreover, even where direct service to the federal government is involved, the fact that a gas distributor may be a government contractor, does not make an interstate pipeline, which serves the distributor, a government subcontractor". If this "fact"

does not, then what does? This statement, by Chairman Hesse, ignores FAR's definition of a government subcontractor.

The compliance filing referenced in the Commission's letters (attached) was proposed by a FERC regulated natural gas pipeline company, primarily to protect its "marketing function". It does so, with the Commission's approval, by limiting competition. Without the Commission's consideration of the requirements of the SBA, FERC provides a large pipeline corporation "corporate welfare benefits" that are not available to small and disadvantaged businesses. FERC's approval of such requests by large pipeline companies denies the economic advantages that SBA would make available to natural gas pipeline customers. The pipeline proposes, and FERC approves, that the cost of this "corporate set-aside" should be passed on to the rate payer (government and the general public) and not incurred by the stockholders of the pipeline corporation. This in effect, is a "corporate bail-out" similar to that provided by Congress for the Chrysler Corporation. However, in this case, FERC authorizes such a bail-out at an enormous cost to the government and to the general public, in such a way, that it violates certain federal laws, specifically

the Small Business Act, without the consideration of Congress, as was required in the Chrysler bail-out. In this action, and other similar actions, the Commission has demonstrated that it acts more as an industry representative by approving stockholders' interest, at the expense of the general public and the U.S. Government.

This committee should request the General Services Administration (GSA) and the Justice Department to instruct FERC as to the requirement, that contracts that it regulates and/or approves, should comply with the requirements of federal law. Specifically, those contracts that obviously provide services directly to the government or to its contractors or subcontractors, should contain the provisions of, and comply with the requirements of Public Law #95-507 and the FAR.

This committee should request the General Accounting Office (GAO) to examine recent FERC Order Nos. 436/500 approvals that would provide "corporate benefits" to large pipeline corporations that are not available to small businesses. GAO should also comment as to the economic impact on the U.S. government and the public of recent FERC rulings. Specifically, the GAO should examine the cost related to the public providing major pipeline

corporations the opportunity to pass through the cost of buying down the pipeline's take or pay obligations, while not providing the same type of economic prepay opportunities to small businesses that would compete with the major pipelines. The GAO should comment as to whether these costs should be incurred by the major corporations or by the general public. Additionally, the GAO should comment as to the availability of competitive services if such passed-through costs are not provided to major pipeline corporations. GAO should report to this Committee as to any other competition-restrictive clauses included in FERC Order Nos. 436/500 approvals. Specific attention should be given to such items as the proposed Gas Supply Inventory Charge.

It is inconceivable, that a federal agency, like FERC, charged with the responsibility of certifying and approving pipeline contracts, that so obviously provides subcontractor supplies and services, could grossly ignore its explicit or implicit obligations to ensure that it not provide license for its regulatees to operate contrary to the requirements of federal law.

UTILITY INDUSTRY TOP 108 COMPANIES

ELECTRIC UTILITY INDUSRY TOP 84	TOTAL SALES*	NONRESIDENTIAL PERCENTAGE**	FUEL AND POWER COSTS**	PERCENTAGE
TEXAS UTILITIES	\$4,083,000,000	60.73%	\$1,479,213,000	36.23%
HOUSTON INDUSTRIES	3,628,000,000	64.82%	1,420,967,616	39.17%
CENTRAL AND SOUTHWEST	2,436,000,000	63.15%	1,079,000,000	44.29%
OTHER TOP 84 ELECTRIC UTILITIES	134,737,000,000		52,843,851,400 ***	39.22%***
TOTAL TOP 84 ELECTRIC UTILITIES	\$144,884,000,000		\$56,823,032,016	39.22%***
GAS AND TRANSMISSION TOP 24	\$42,369,000,000			
TOTAL INDUSTRY COMPOSITE	\$187,253,000,000			

* THE BUSINESS WEEK TOP 1000 1988

** ANNUAL REPORTS

*** CALCULATED USING WEIGHTED AVERAGE OF THE THREE COMPANIES LISTED

UNITED STATES ARMED SERVICE POWER CONSUMPTION

CONSUMPTION GROUP	POPULATION	COST OF SERVICE
NATURAL GAS USAGE		
SAN ANTONIO AREA USAF BASES	62,463	\$6,616,812 **
ESTIMATED TOTAL ARMED SERVICES	2,975,287	\$315,177,220 *
ELCTRICITY USAGE		
SAN ANTONIO AREA USAF BASES	62,463	\$31,905,976 **
ESTIMATED TOTAL ARMED SERVICES	2,975,287	\$1,519,770,674 *
TOTAL ARMED SERVICES NATURAL GAS & ELECTRICITY USAGE		\$1,834,947,894

* CALCULATED USING PER CAPITA FIGURE

** COMPILED FROM INFORMATION RECEIVED FROM THE DEPARTMENT OF THE AIRFORCE

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

April 1, 1988

CHAIRMAN

Honorable Mickey Leland
House of Representatives
Washington, D.C. 20515

Dear Mr. Leland:

Thank you for your letter of February 8, 1988, concerning the implementation of Public Law (Pub.L.) 95-507. I share your concern that the intent of Pub.L. 95-507 must be carried out.

Section 211 of the law requires Federal agencies to insure that firms from whom they buy goods and services comply with the subcontracting requirements of the law. The Federal Energy Regulatory Commission (FERC) is in compliance with Pub.L. 95-507 and requires that its contractors comply with the subcontracting provisions of the law. The FERC does not have a major procurement program. Our contracts are typically related to goods and services which we buy in support of the Commission's activities. We recently awarded a \$15 million contract to the Maxima Corporation, a minority-owned firm. This is the largest contract that FERC will award during fiscal year 1988. We require that our contractors comply with the spirit and intent of Pub.L. 95-507.

Your letter requests that FERC demand compliance with Pub.L. 95-507 by utilities it regulates with regard to rates, certificates and licenses. This statute does not give FERC the authority to require compliance with the law by other than its own contractors. Utilities which are regulated by FERC are not FERC contractors. We do not buy utilities or utility services from the firms that we regulate. As such, we have no authority to require that utilities that we regulate comply with the requirements of Pub.L. 95-507.

Your letter also specifically expresses concern that certain provisions in Texas Eastern Transmission Corporation's proposal to become an open access pipeline will prevent its utility customers from meeting their obligations under Pub.L. No. 95-507. The Commission's regulations should give the utility

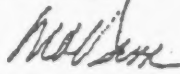
Honorable Mickey Leland
Page two

customers of open access pipelines an opportunity to comply with Pub.L. No. 95-507. Specifically, these regulations allow the sales customers of interstate pipelines the option to purchase gas from another source, including a small and disadvantaged business that sells gas, instead of buying gas from the pipeline, and to have that gas transported over the pipeline. A large majority of Texas Eastern's sales customers have chosen to continue to buy about 50 percent of their gas needs from Texas Eastern if Texas Eastern becomes an open access transporter; however, they have reserved their right to purchase up to 50 percent of the gas they currently purchase from the pipeline from other sources and to obtain transportation of that gas over the pipeline. This agreement should still allow Texas Eastern's customers to purchase substantial amounts of gas from suppliers other than Texas Eastern, including small and disadvantaged businesses that sell gas and should enable Texas Eastern's customers to meet their obligations under Pub.L. No. 95-507.

You also express concern that certain pre-billed items included in Texas Eastern's proposed rates would prevent its customers from purchasing from other suppliers. While your reference to pre-billed items is not entirely clear, it appears to refer to Texas Eastern's proposal to collect a gas inventory charge from its sales customers. The Commission has set that proposal for expedited hearing and will consider all aspects of that proposal based on the record established in that proceeding.

I hope that this letter is responsive to your concerns. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Martha C. Hesse

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

CHAIRMAN

March 1, 1988

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Energy Regulation
and Conservation
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Metzenbaum:

Thank you for your letter of January 25, 1988, concerning the application of section 211 of Pub. L. No. 95-507, codified at 15 U.S.C. § 637(d), to open access transportation performed under Order Nos. 436 and 500.

Section 211, which pertains to rights of small and economically disadvantaged businesses, only applies to utilities which provide services to the federal government. It does not apply to utilities merely because they are within the Commission's regulatory jurisdiction. Moreover, even where direct service to the federal government is involved, the fact that a gas distributor may be a government contractor does not make an interstate pipeline which serves the distributor a government subcontractor.

This issue was raised in response to a compliance filing made by Texas Eastern Transmission Corporation in November 1987 in Docket No. RP85-177-044, et al. In that order, the Commission expressed doubt that the statute applies to interstate pipelines such as Texas Eastern. Specifically, it does not appear that an interstate pipeline is a subcontractor within the meaning of the statute. Rehearing of the Texas Eastern order is now pending before the Commission.

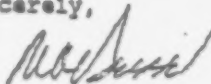
Order Nos. 436 and 500 prohibit interstate pipelines from unduly discriminating in providing access to transportation on interstate pipelines. The Commission has implemented the prohibition against undue discrimination by requiring that access to available capacity be provided on a "first come, first served" basis. Use of this principle is an effort to ensure that all shippers, including small and economically disadvantaged businesses, have an equal opportunity to obtain service.

FEB 18 1987

As your letter notes, however, little firm capacity is presently available to new market entrants because most of it is committed to existing pipeline sales customers. The Commission included in Order No. 436 a contract demand reduction provision which was intended to free up firm capacity where not needed by existing customers. However, the court in Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir 1987), held that this provision had not been adequately justified. In Order No. 500, the Commission requested comment on whether the contract demand reduction provision should be reinstated. This issue is now pending the development of a final rule in response to the court's decision.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,



Martha O. Hesse

APR 11 1988

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

March 24, 1988

Honorable Kweisi Mfume
House of Representatives
Washington, D.C. 20515

Dear Mr. Mfume:

Thank you for your letter of March 2, 1988, forwarding a letter from Andrew Searcy, Jr., President of the XXerxe Group, Inc. Mr. Searcy expresses concern that the Commission's December 31, 1987 order on Texas Eastern Transmission Corporation's proposal to become an open access pipeline approved agreements between Texas Eastern and its customers which violate Public Law No. 95-507. He also enclosed a copy of XXerxe's request for rehearing of the Commission's December order.

Section 211 of Public Law No. 95-507 requires utilities which provide services to the Federal Government to give small and disadvantaged businesses the maximum opportunity to participate in the performance of the utilities' Federal contracts. This appears to require that utilities selling gas to the Federal Government give small and disadvantaged businesses the maximum opportunity to supply the gas sold to the government. Some of Texas Eastern's utility customers apparently do sell to the Federal Government.

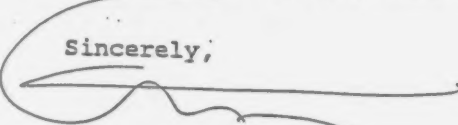
The agreements between Texas Eastern and its customers mentioned in Mr. Searcy's letter provide that those customers will continue to buy about 75 percent of their gas needs from Texas Eastern for the next six years and 50 percent thereafter, if Texas Eastern becomes an open access transporter; however, the customers have reserved the right to purchase up to 25 percent of the gas they currently purchase from the pipeline from other sources during the next six years and 50 percent thereafter. Texas Eastern has agreed to transport that gas. The Commission found in its December 1987 order that these agreements would allow Texas Eastern's customers to purchase substantial amounts of gas from suppliers other than Texas Eastern. This should enable Texas Eastern's customers to meet their obligations under Public Law No. 95-507.

- 2 -

On rehearing of the Commission's December 31 order, XXerxe requested that the Commission require that Texas Eastern permit its customers who sell gas to the Federal Government to reduce their purchases from Texas Eastern by whatever amount of gas they purchase from small and disadvantaged businesses. XXerxe also requested that Texas Eastern be required to certify its compliance with Public Law No. 95-507. In an order issued March 21, 1988, the Commission denied rehearing. It observed that the U.S. Court of Appeals for the D.C. Circuit held in Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), that the provision in the Commission's open access transportation regulations giving a pipeline's customers the right to reduce their contractual obligations to purchase from the pipeline had not been adequately justified. In Order No. 500, the Commission has requested comment on whether this option should be reinstated and this issue is now pending before the Commission. The Commission also stated that while Public Law No. 95-507 may apply to those customers of Texas Eastern who sell gas to the Federal Government it probably does not apply to Texas Eastern. This is because the law does not apply to utilities merely because they are within the Commission's regulatory jurisdiction. Also, the fact that a customer of a pipeline has a government contract does not make the pipeline a subcontractor of the government. I have enclosed a copy of the Commission's order on rehearing for your information.

If I can be of any further assistance to you, please do not hesitate to contact me.

Sincerely,



Roger W. Gale
Director
Office of External Affairs

Enclosure

GAO**United States General Accounting Office****Testimony**

For Release
on Delivery
Expected at
10:00 a.m. EDT
Wednesday
July 6, 1988

Compliance with Subcontracting
Plan Requirements

Statement of
L. Nye Stevens, Associate Director
General Government Division

Before the
Committee on Small Business
United States House of Representatives



GAO/T-GGD-88-45

COMPLIANCE WITH SUBCONTRACTING PLAN REQUIREMENTS

SUMMARY OF STATEMENT BY
L. NYE STEVENS
ASSOCIATE DIRECTOR
GENERAL GOVERNMENT DIVISION

GAO reviewed how well the General Services Administration, the Department of Energy and the Department of the Navy are complying with Section 211 of Public Law 95-507 by examining contract awards and modifications made in 1985 and 1986. This statute requires that large federal contracts, with certain exceptions, contain a plan providing for the maximum practicable utilization of small and small disadvantaged businesses as subcontractors. GAO also reviewed compliance with this requirement by public utility companies providing service to the government with special emphasis on utility services acquired by GSA, Energy, and the Department of Defense.

GAO found that:

- Almost a third of the contract actions examined at Navy that did not contain a subcontracting plan did not have a justified reason for lacking a plan. This compares to 2 percent of the contracts without a plan at GSA and 6 percent at Energy.
- At least 23 public utility companies provide service to federal agencies but have declined to enter into formal, written contracts with the government. GAO believes that these companies are nonetheless subject to the requirements of Section 211 of Public Law 95-507.
- When utility services are obtained under contract, compliance with the requirement for a subcontracting plan varies widely. All GSA utility contracts that should have had plans were in complete compliance. Several instances of noncompliance were noted with Energy's utility contracts. At the Department of Defense, it does not appear that any utility contracts contain subcontracting plans because procurement staff are using outdated guidance.

Mr. Chairman and Members of the Committee, it is a pleasure to appear before you today to discuss our reviews of the compliance with statutory subcontracting plan requirements at certain government agencies. The Committee requested us to review the compliance of the General Services Administration (GSA) and the Departments of Energy and the Navy with the statutory requirement that, with certain exceptions, large federal contracts contain subcontracting plans for the maximum practicable use of small and small disadvantaged businesses. Our report on the results of that review (GGD-88-83, May 24, 1988) is being released by the Committee today.

In June of last year the Committee made another request and asked us to provide information and legal opinions on the compliance with federal subcontracting requirements of public utility companies providing service to the government, with particular emphasis on utilities acquired by GSA, Energy and the Department of Defense. These agencies purchase more utility services than any other federal agencies. Our testimony today will highlight our recent report to the Committee and also deal with the related issues and questions raised by the Committee concerning public utilities.

REQUIREMENTS FOR SUBCONTRACTING PLANS

As you know, Section 211 of Public Law 95-507, enacted on October 24, 1978, requires that, with certain exceptions,

contracts and contract modifications awarded by federal agencies that exceed \$500,000, or \$1 million in the case of construction contracts, contain a subcontracting plan providing for the maximum practicable utilization of small and small disadvantaged businesses.

Subcontracting plans, which are prepared by contractors subject to the review and approval of the agency awarding the contract or modification, must contain certain provisions such as:

- separate percentage goals for using small and small disadvantaged businesses as subcontractors, and
- assurances that the contractor will require all subcontractors (except small businesses) that receive awards in excess of \$500,000 (\$1 million for construction subcontracts) to also prepare and implement a subcontracting plan.

Subcontracting plans are not required for contracts

- with small business concerns,
- for personal services,
- to be done entirely outside the United States, and
- where the contracting officer certifies that no subcontracting opportunities exist.

Failure to comply in good faith with the requirements of the subcontracting plan can be considered a material breach of contract.

COMPLIANCE WITH SUBCONTRACTING PLAN
REQUIREMENTS AT GSA, ENERGY, AND NAVY

As requested, we examined how well GSA, Energy and the Navy are

complying with the federal statute requiring subcontracting plans. To accomplish this, we reviewed 2,052 contract files at 15 procurement offices located in the Washington, D.C. and San Francisco metropolitan areas and New York City, Chicago, and Oak Ridge, Tennessee. Our sampling plan did not include a random selection of locations throughout the country so we cannot project conditions on an agencywide basis.

At GSA, we visited the 8 offices which had awarded almost two thirds of all GSA contracts for \$500,000 or more in the 18-month period ending in March 1987. Of the 968 contracts we examined, 503 did not contain subcontracting plans, most for valid reasons. For example, 413 of these were awarded to small businesses and thus did not require a plan.

While almost all of the other contracts without plans at GSA had justified reasons, we found 11 contracts that should have had plans but did not. All 11 cases were multiyear contracts with a total face value exceeding the dollar threshold. However, the GSA contracting officers had erroneously calculated the dollar value on an annual basis which resulted in dollar values less than the \$500,000 level where plans are required.

At Energy, we examined over 60 percent of all contracts with a value of \$500,000 or more that were open during fiscal year 1986. Of the 457 contract awards and modifications we examined, 233 did

not have subcontracting plans. Similar to GSA, most of the contract actions without plans had justified reasons. We found 15 actions, however, that should have had plans. Six of these were multiyear actions where, as at GSA, the dollar value had been calculated on an annual basis. The remaining nine cases were the result of oversight.

At the Navy, we examined the three largest commands in terms of procurement dollars. Together, these commands accounted for slightly more than half of all Navy procurement dollars during fiscal year 1986. We reviewed 627 contract actions that met the dollar threshold for requiring a subcontracting plan and found 272 without a plan. While many of these were justified in not having a plan, 84 of them, or 31 percent, were not. In all 84 cases the reason given for the lack of a plan was oversight.

SUBCONTRACTING GOALS FOR SMALL
AND SMALL DISADVANTAGED BUSINESSES

Slightly more than half of the contract awards and modifications we examined had subcontracting plans which contained goals for the use of small and small disadvantaged businesses as subcontractors. These goals are expressed as percentages of the total amount of subcontracting to be done under the procurement action and selected statistics for the goals are presented in our report. Our analysis shows that the average small business goal for GSA, Energy and the Navy was 23 percent, 39 percent, and 40

percent, respectively. The average small disadvantaged business goals were 2 percent, 7 percent, and 3 percent, respectively.

Although these statistics provide a useful overview of the program at each agency, we would caution that they should not be used for comparative purposes. The adequacy of a subcontracting plan's goals should be assessed on a case by case basis.

Consequently, it is neither feasible nor reasonable to formulate quantitative criteria for subcontracting goals. Without such criteria, one plan's goals cannot be compared to another's and one agency's statistics cannot be compared to another's.

During our review, we attempted to determine how successful contractors are in achieving the goals contained in the subcontracting plans. Although the available data permitted only a limited analysis on an aggregate basis, it appears that in general, most of the subcontracting goals at the three agencies we reviewed are being achieved.

COMPLIANCE OF PUBLIC UTILITY COMPANIES
WITH SUBCONTRACTING PLAN REQUIREMENTS

GSA has statutory authority to enter into long-term contracts for utility services for federal agencies for periods not to exceed 10 years. These contracts may be in the form of an areawide contract furnishing service to several federal agencies located within the supplier's area of service or a contract to provide

service to a single user. GSA may also delegate authority to other agencies to negotiate and award their own utility contracts.

The prices charged by public utilities are determined by rate schedules which apply to all users and are based on such factors as normal volume and peak usage hours. Contracts between utilities and the government generally specify only that the government will pay the rates and receive the discounts to which it is entitled. They do not specify a rate to be paid by the government or affect the rate in any manner.

Although federal procurement regulations require agencies to obtain a contract for all purchases exceeding \$25,000, some utility companies, for various reasons, have declined to enter into contracts with the federal government. In most instances, federal agencies have no choice but to purchase these utility services without a contract since alternative sources are not available.

As requested, we identified which utility companies have declined to enter into contracts with GSA and have listed them in the attachment to this testimony. Of the 23 companies listed, 10 specifically objected in whole or in part to the requirement for subcontracting plans. The other 13 cited more general objections to entering into contracts for service.

GSA has made progress in persuading more public utilities to provide services to the government under formal contract. In 1976 there were 41 areawide contracts in effect with utility companies. As of June 1988 this number had increased to 67. In addition, 12 single-user contracts had been awarded by GSA.

Based upon our review of the pertinent federal statutes, it is our opinion that a public utility which sells services to the federal government, but which declines to enter into a formal contract with the government, is nonetheless legally required to satisfy the subcontracting plan requirements of section 211 of Public Law 95-507. We are providing our legal opinion on this matter to the Committee under separate cover.

In our opinion, the most realistic remedy available to the government in cases where there is no formal contract is to seek judicial enforcement of the subcontracting plan requirements by obtaining an injunctive order enjoining the utility from failing or refusing to comply with the statutory requirements.

The practicality of pursuing this remedy is a matter the agencies should consider in light of the individual circumstances. While judicial enforcement of the subcontracting plan requirements is generally available to the government, our examination of case law suggests that the probability of success in obtaining an

injunction to effect this remedy is uncertain.

SUBCONTRACTING PLANS CONTAINING
MODIFIED CLAUSES

In January 1984, in an attempt to encourage more utility companies to execute contracts, GSA requested approval from the Small Business Administration to modify the clause required in subcontracting plans that specifies that all subcontractors other than small businesses that receive awards meeting the dollar threshold must also prepare and implement a subcontracting plan. In order to address the concerns of a number of utility companies over this so called "flowdown" clause, GSA proposed to modify the clause so that it would have required plans only from subcontractors receiving subcontracts of more than \$500,000 to construct and operate facilities directly pertinent to providing service to the government. SBA approved the modification the following month.

In October 1986, in response to an inquiry from this Committee, SBA reversed its position on allowing modified clauses to subcontracting plans. Although GSA has subsequently stopped using the modified clause in its negotiations with utility companies, 26 contracts were awarded which contained the modified clause in the subcontracting plans. GSA informed us that three of these have been corrected and that it will attempt to correct the others as time and resources permit.

In our opinion, neither GSA nor SBA has the authority to modify clauses in a way which affects the implementation of the statutory subcontracting plan requirements. The remedies available to the government regarding contracts with subcontracting plans that have been altered in an unauthorized manner are to modify the contract so that the plan contains the correct clause, terminate the contract and resolicit the procurement, or, as previously discussed, seek judicial enforcement. Again, the practicality of pursuing any of these remedies should be considered in light of individual circumstances. A contract modification, if made unilaterally by the government, might not be complied with by the contractor. Contract termination does not appear to be realistic, since generally, the utilities are monopoly suppliers. Finally, as noted earlier, judicial enforcement is uncertain.

UTILITY SUBCONTRACTING PLANS AT
GSA, ENERGY, AND THE DEPARTMENT OF DEFENSE

Finally, you asked that we compare the efforts of GSA and the Departments of Energy and Defense to assure that contracts for utility services comply with subcontracting plan requirements.

All of the utility contracts awarded by GSA that should contain subcontracting plans do contain plans.

The Department of Energy annually procures utility services costing about \$1 billion. Because centralized data and files for these procurements are not available, we did not make a detailed review of files at Energy and cannot specify the extent to which the Department is obtaining utility service under contract and which of these comply with the subcontracting plan requirements. Based on the contract files we did review, however, and the discussions we had with Energy officials in the field offices, we identified several instances where utility companies declined to enter into contracts with Energy and where contracts that should have had subcontracting plans did not.

These include the following examples:

- Six utility companies have declined to enter into contracts with Energy generally because of objections in whole or in part with the subcontracting plan requirement.
- Three utility companies have signed contracts but insisted that the subcontracting plan requirement be removed from the contract.
- One company has a contract but has not submitted the required plan.
- A number of contracts were awarded before the implementation of Public Law 95-507 and therefore do not require subcontracting plans. Many of these contracts, however, are more than ten years old in spite of federal and Energy regulations which limit contracts for utility services to ten years. At least one utility company has declined to renew an outdated contract because of the subcontracting plan requirement.

All of the information we obtained at the Department of Defense is based on interviews with officials at various levels throughout the Office of Secretary of Defense and the Army, Navy,

and Air Force Departments. Because the necessary records are dispersed at numerous locations across the country, we did not review any contract files.

In fiscal year 1987 the Department of Defense purchased almost \$2 billion of utility services. We were informed that most of these services were acquired under contract although some utility companies, as is the case at GSA and Energy, have declined to sign contracts with the military services. Our discussions with various officials responsible for procuring utility services indicate that very few of the military's utilities contracts, if any at all, contain subcontracting plans.

When awarding contracts for utility services, each branch of the military follows the policies and procedures contained in guidelines issued in 1974. These guidelines also provide a standardized format for utility contracts. Because the guidelines predate the law requiring subcontracting plans for certain federal procurements, contracts that are written in the suggested format do not say that subcontracting plans are required.

An official responsible for utility acquisitions on a Department-wide basis said that, in all probability, utility contracts written for the military would not contain subcontracting plans because contracting officers were using the 1974 guidelines and

were not aware of the requirement.

In discussions we had with officials responsible for utilities procurement at eight major commands within the Army, Navy, and Air Force, we were also told that most did not know of the requirement and that none were enforcing it. None of the individuals that we spoke with knew of any contract for utility services awarded by the military that contained a subcontracting plan.

This concludes my comments on the two reviews done for the Committee. My colleagues and I would be pleased to answer your questions.

ATTACHMENT

ATTACHMENT

PUBLIC UTILITY COMPANIES DECLINING TO SIGN
CONTRACTS WITH THE GENERAL SERVICES ADMINISTRATION

- *Alaska Electric Light and Power Co.
Juneau, Alaska
- *Department of Public Works
Arlington, Virginia
- *Department of Public Utilities
Newport News, Virginia
- *The Cleveland Electric Illuminating Company
Cleveland, Ohio
- *The East Ohio Gas Company
Cleveland, Ohio
- The Florida Power & Light Company
Miami, Florida
- The Long Island Lighting Company
Patchogue, New York
- *The Oklahoma Electric Company
Oklahoma City, Oklahoma
- *The Potomac Electric Power Company
Washington, D.C.
- *The San Diego Gas & Electric Company
San Diego, California
- *The Tucson Electric Power Company
Tucson, Arizona
- *The Washington Suburban Sanitary Commission
Hyattsville, Maryland
- The Arkansas Power & Light Company
Little Rock, Arkansas
- The Baltimore Gas and Electric Company
Baltimore, Maryland
- The Consolidated Edison Company of New York, Inc.
New York City, New York
- * Companies that objected in whole or in part to the requirement
for a subcontracting plan for small and small disadvantaged
businesses.

ATTACHMENT

ATTACHMENT

PUBLIC UTILITY COMPANIES DECLINING TO SIGN
CONTRACTS WITH THE GENERAL SERVICES ADMINISTRATION

The Consumers Power Company
Jackson, Michigan

The Florida Power Corporation
St. Petersburg, Florida

The Louisville Gas and Electric Company
Louisville, Kentucky

New Orleans Public Service Inc.
New Orleans, Louisiana

The Public Service Company of North Carolina, Inc.
Gastonia, North Carolina

The Memphis Light, Gas and Water Division
Memphis, Tennessee

The Kentucky-American Water Company
Lexington, Kentucky

The Johnson City Power Board
Johnson City, Tennessee



Comptroller General
of the United States
Washington, D.C. 20548

B-229245

July 5, 1988

The Honorable John J. LaFalce
Chairman, Committee on Small Business
House of Representatives

Dear Mr. Chairman:

This is in response to your request for our views on three issues concerning the implementation of the small business and small disadvantaged business subcontracting program established under section 8(d) of the Small Business Act, Pub. L. No. 95-507, § 211, 92 Stat. 1757, 1767, 15 U.S.C. § 637(d).

You first asked our opinion on whether a public utility which sells services under tariff to the federal government, but which refuses to enter into a formal contract with the government covering that service, is nonetheless legally required to satisfy the subcontracting plan requirements of section 211 of Public Law 95-507 (15 U.S.C. § 637(d)(4) and (5)).

In performing our analysis of this issue, we reviewed a memorandum prepared by the Department of Justice (Justice) addressing the same issue. Justice concluded that such utilities are required to satisfy the statutory subcontracting plan requirements. We agree with Justice's conclusion.

You also asked what remedies may be available to GSA or the government, generally, to require compliance with the Small Business Act's subcontracting plan requirements by those utilities selling services to GSA that should have, but did not, submit a plan.

Two contractual remedies are available to the government where contractors subject to the statutory subcontracting plan requirements have not submitted a plan: contract modification, to include the required clause, and termination of the contract and resolicitation of the procurement. In addition, the government could seek judicial enforcement of contractor compliance with the subcontracting plan requirements by attempting to obtain an injunctive order

enjoining the noncomplying utility from failing or refusing to comply with statutory requirements.

Finally, you asked whether GSA and SBA, at any time, agreed to alter the so-called "flow down" clause required by relevant sections of the Federal Acquisition Regulations (FAR) in an illegal or inappropriate manner. In this connection, you asked that we specify the remedies available to GSA or the government, generally, to remedy previously executed contracts that may contain "flow down" clauses that are inconsistent with FAR.

Upon its failure to include the regulatory "flow down" clause then contained in the Federal Procurement Regulation (FPR) (the predecessor of FAR) in certain negotiated utility contracts, GSA sought and obtained SBA approval to alter the language of that clause in a manner acceptable to the utilities in question. Subsequent to inclusion of the revised clause in the executed contracts, both GSA and SBA acknowledged the impropriety of using the revised "flow down" clause. We agree that revision of the clause was improper, since the original regulatory clause implemented statutory subcontracting requirements which GSA had no authority to waive. We believe the remedies available to the government in this situation are the same remedies available where utility contracts were executed without any of the statutory subcontracting plan requirements, i.e., contract modification, contract termination, or possible judicial enforcement to compel contractor compliance with the statutory "flow down" clause requirement.

A staff analysis covering these issues in detail is enclosed.

Sincerely Yours,

Milton J. Fowler
for Comptroller General
of the United States

Enclosure

ENCLOSUREGAO ANALYSIS OF GSA'S ENFORCEMENT OF SUBCONTRACTING PLAN
REQUIREMENTS OF PUBLIC LAW 95-507 IN PROCUREMENT OF PUBLIC
UTILITY SERVICESI. Background

Under section 201(a)(3) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 481(a)(3), the General Services Administration (GSA) is authorized to contract with public utility firms to procure utility services on behalf of federal agencies. Implementing regulations are contained in the Federal Acquisition Regulations (FAR) at 48 C.F.R. Chapter 1, Subpart 8.3. Under these regulations, formal bilateral contracts are required for utility services or connections exceeding a certain minimum. 48 C.F.R. § 8.304-5(e)(3),(4).

In addition, Congress has prescribed a subcontracting program for small businesses and small disadvantaged businesses in section 8(d) of the Small Business Act, Pub. L. No. 95-507, § 211, October 24, 1978, 92 Stat. 1767, 15 U.S.C. § 637(d). Under this law, federal contracts let by a federal agency for \$10,000 or more must contain a clause stating, among other things, that it is federal policy that such small businesses have the "maximum practicable opportunity to participate in the performance of" federal contracts. See 15 U.S.C. § 637(d)(3)(A). The following language in 15 U.S.C. § 637(d)(3)(A) and (B) regarding the use of small businesses is the statutory basis for this clause:^{1/}

"(A) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for

^{1/} The required clause is set forth in FAR, 48 C.F.R. § 52.219-9. Also, the same policy statement contained in subsection 637(d)(3)(A) is also contained in subsection 637(d)(1).

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subsystems, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

"(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause."

For contracts of \$500,000 or more (\$1,000,000 or more for construction of a public facility), the law imposes more extensive requirements. With regard to a contractor's responsibility to develop a specific subcontracting plan for such negotiated contracts, 15 U.S.C. § 637(d)(4) provides:

"(4)(A) Each solicitation of an offer for a contract to be let by a federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

"(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which -

- (i) is to be awarded, or was let, pursuant to the negotiated method of procurement,
- (ii) is required to include the clause stated in paragraph (3),
- (iii) may exceed \$1,000,000 in the case of a contract for the construction of any public

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facility, or \$500,000 in the case of all other contracts, and
 (iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract."^{2/}

II. Applicability of Statutory Subcontracting Plan Requirements to Utilities Supplying Services Under Tariff to the Government

The Committee has asked whether a public utility which sells services under tariff to the federal government, but which refuses to enter into a formal contract with the government covering that service, is nonetheless legally required to satisfy the subcontracting plan requirements of 15 U.S.C. § 637(d)(4) and (5).

In a memorandum from the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (Justice), dated March 27, 1987, to the General Counsel of GSA, Justice addressed this same issue. Justice concluded that such utilities are required to satisfy those statutory subcontracting plan requirements. We agree with the Justice Department conclusion.

In its analysis, Justice addresses arguments relied on by several utilities to support the position that they fall outside the scope of 15 U.S.C. § 637(d), namely:

(1) pursuant to subsection 637(d)(4)(B), the subcontracting plan requirements attach only to contracts which have been formally negotiated, and the utilities have refused to negotiate; and

^{2/} Similar provisions applicable to contracts awarded pursuant to formal advertising are contained in 15 U.S.C. § 637(d)(5). Implementing regulations are found in FAR, 48 C.F.R. Subpart 19.7.

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(2) the utilities have no contract at all with the federal government, within the meaning of subsection 637(d), but provide services pursuant to state tariffs which require them to provide service to all customers.

As to the first argument, Justice states that the utilities are simply mistaken. According to Justice, the plain sense of the language in subsection 637(d)(4)(B) is to specify "the negotiated method" as merely the type of procurement covered in order to distinguish it from the "formally advertised" method of procurement covered under subsection 637(d)(5), and thus does not require that "negotiated method" contracts be actually negotiated in order to come within section 637(d). Justice states that the net effect of subsections (d)(4) and (d)(5) is to require subcontracting plans for all government contracts that meet the requisite dollar amount and offer subcontracting possibilities, and consequently the extent to which specific contract terms are actually negotiated is irrelevant. We agree.

In our view, the language of subsection 637(d)(4) is intended to distinguish the negotiated method of procurement from the formally advertised method. That provision, however, does not expressly require that contracts actually be negotiated. We found nothing in the legislative history of the Small Business Act to support or reject the notion that § 637(d)(4)(B) implicitly requires "actual negotiation." We conclude that subsections 637(d)(4) and (5), read together, require subcontracting plans for all government contracts meeting the statutory amounts and offering subcontracting opportunities. We believe Justice's interpretation supports the statutory purpose as stated in subsection 637(d)(1) that small business concerns, including those owned and controlled by socially and economically disadvantaged individuals, have the "maximum practicable opportunity" to participate in government contracts.

We have previously recognized that GSA is authorized to procure utility services for the government under tariffs, and that such procurement from regulated utilities which are virtual monopolies is unique because there is no other source for the needed services. 59 Comp. Gen. 705, 707 (1980). The fact that a utility, due to its monopoly

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status, could force the government to procure its services without the benefit of actual negotiation, would lead to frustration of the statutory purpose expressed in subsection 637(d)(1) if such tariff arrangements were viewed as procurement outside the scope of the statute's coverage. We find no basis in the statute or its legislative history which would support such a result.

As to the utilities' second argument that they have no contract with the federal government, they contend that since (a) the only applicable "contract" stems from their state tariffs, and (b) state laws compel them to service all customers, including the federal government, this compulsion vitiates any consent on the utilities part to the federal contract provisions.

Justice rejects this argument on the basis of section 211's legislative history. The House Conference Report on Public Law 95-507 explained that Congress intended the statutory subcontracting requirements to apply to all its government contracts, including those not competitively negotiated:

"It is the intent of the conferees that these subcontracting requirements are not to be construed as being limited to competitively negotiated procurements. Each year executive agencies award large amounts of noncompetitive negotiated (sole source) contracts which provide opportunities for subcontracting. Federal agencies should make provisions to insure that, prior to the award of such contracts, contractors be required to submit contracting plans." H.R. Rep. No. 95-1714, 95th Cong., 2d Sess. 26, reprinted in (1978) U.S. Code Cong. & Adm. News 3879, 3887.

In citing this provision, Justice states in a footnote that Congress, by specifically exempting sole source utility procurements in subsection 637(g)(1)(E) from certain unrelated notice requirements, recognized the peculiarity of that type of procurement without expressly exempting utilities from the subcontracting plan requirements. We agree with Justice on this point. The statute requires negotiation of a subcontracting plan "[b]efore the award of any contract to be let . . . by any Federal agency which . . . is to be awarded . . . pursuant to the negotiated method of procurement." 15 U.S.C. § 637(d)(4)(B). (Emphasis added.) According to GSA, the government procures

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services from regulated utilities under noncompetitive, negotiated sole source contracts. We believe the cited provision from the Conference Report makes it clear that Congress intended the subcontracting provisions to apply to such sole source contracts which meet the requisite dollar amount and provide subcontracting opportunities. And, as we noted above, the fact that the government procures utility services without benefit of actual negotiation is not a basis to limit the statutory reach of section 637(d)(4).

Justice also states that both the utilities' arguments were rejected in United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977), vacated on other grounds and remanded, 436 U.S. 942 (1978), and goes on to analyze that decision in this context. In its analysis, Justice summarizes the decision in that case as follows:

" . . . the utility argued that it was not bound by the affirmative action requirements of Executive Order 11246 and its implementing regulations since it [was] not furnishing energy to the government pursuant to any contract, but . . . pursuant to its franchises, granted by the City, which require [it] to provide power to all who request it. . . . The utility further argued that it had not agreed to the affirmative action provisions required by the Executive Order of all government contractors. Indeed, it had specifically refused to agree to them

"The court rejected both arguments. The court found from the parties' course of dealing, that the utility did indeed have a contract with the government. The court noted that the mere fact [t]hat the company services customers under local franchises does not negate the obvious fact that [it] renders such services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing. . . . The court further remarked upon the unique features of government contracting, stating that where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly agreed to by the parties. . . .

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"Under this analysis, we believe utilities are contractors within the meaning of section 637(d). It is true that the nonconsensual inclusion of federal contract terms seem particularly troubling in situations where state law mandates the transaction. It may appear that utilities are being unfairly whipsawed by state law and federal law--they are required by law to service all customers, including the federal government; because they service the federal government, they are required by the terms of their federal contract to implement a small business subcontracting program. Nevertheless, this predicament results largely from requirements which attach to the utilities' legally protected monopoly status. By engaging in a business which is a legally-established and regulated monopoly, utilities must be deemed to accept both the benefits and burdens attendant upon that status.

"In sum, the obligations of Public Law 95-507 are implied by law in those government utility contracts which are above the requisite amount, and which afford opportunities for subcontracting, whether or not they are expressly included in a written agreement. This is so regardless of the utilities' status as legally established and regulated monopolies, and regardless of whether they have specifically consented to the relevant contract provisions."

We have examined the decision in United States v. New Orleans Public Service, Inc. In our view, Justice's summary of that decision is accurate, and its analysis and conclusion reflect a proper application of the principles enunciated in that decision to the issue before it. Thus, we agree with Justice that, based on that decision, the utilities in question are contractors within the meaning of 15 U.S.C. § 637(d).

III. Remedies Available to the Government for Utilities' Failure to Comply with Subcontracting Plan Requirements

We have also been asked what remedies may be available to GSA or the government, generally, to require compliance with the subcontracting plan requirements by those utilities

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whose services are purchased by GSA and have not, but should have, submitted such plans.

Both the statute and the implementing regulations provide that failure of a contractor or subcontractor to comply in good faith with the subcontracting plan requirements is a material breach of contract. See 15 U.S.C. § 637(d)(8); FAR, 48 C.F.R. § 19.702(c). Yet neither the statute nor the regulations specify what actions GSA or the government may take to obtain compliance with the subcontracting plan requirements.

In our decision in B-114835, October 19, 1979, we addressed the issue of remedies available to the government in such situations. In its concern over the delay by GSA and the Department of Defense in adopting regulations to implement the subcontracting plan requirements, a member of the House Committee on Small Business asked us the following question:

"What is the legal status of all Federal contracts awarded since October 24, 1978, that fall within the scope of section [637(d)] but which do not contain the mandated subcontracting plans? If you determine that all or any particular group of such contracts suffer from a legal deficiency because they do not contain plans, can that deficiency be remedied by executing modifications to such contracts which contain plans? What other remedies, if any, are available?"

In our response, we stated:

"It is our view, for the reasons already indicated, that the legality of the contracts awarded after October 24, 1978, and before issuance of implementing regulations, is not impaired by the absence of the [subcontracting] plans

"Contracts awarded after issuance of the regulations should contain subcontractor plans

"We agree with you that contracts which fail to contain plans required under section [637(d)] and the implementing regulations are legally deficient. However, we believe the remedy must depend on the particular circumstances. Contract modifications might be appropriate under certain conditions. On the other hand, contract

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termination and a resolicitation of the procurement might be the preferable solution in other cases. Also, situations could arise where it is not feasible to remedy the situation. For example, urgency might preclude amending the contract to include a plan which would delay the performance. We do not anticipate that this situation would arise very often."

Thus, at least two (2) contractual remedies are available to the government where qualifying contracts do not contain subcontracting plans: contract modification to include the required plans, and termination of the contract and resolicitation of the procurement. To our knowledge, there have been no statutory or regulatory changes since our decision in B-114835 which would have changed the remedies available to the government.

Another remedy which might be available to the government is judicial enforcement of the subcontracting plan requirements. While this remedy is generally available to the government, the probability of success in obtaining an injunction to effect this remedy is uncertain. The enforcement proceedings in United States v. New Orleans Public Service, Inc., above, in which the government pursued such a remedy to enforce contractor compliance with the equal opportunity provisions of Executive Order 11246, are instructive on this point.

In that case, GSA sought judicial enforcement to compel the utilities to comply with Executive Order 11246. The order itself and the implementing regulations provided for judicial enforcement as an alternative to administrative enforcement proceedings to effect compliance. A federal district court issued a general injunctive order permanently enjoining the utility from failing or refusing to comply with the order without an exemption, from refusing to allow GSA or other appropriate federal agencies to conduct compliance reviews, and from refusing to provide access to the utility's premises and books. The Fifth Circuit Court of Appeals set aside the district court's general injunctive order holding that, as an equitable matter, fundamental fairness required the government to seek voluntary compliance before calling for judicial enforcement; it stated that compliance could be best dealt with through the government's own administrative compliance process. It reasoned that executive agencies have expertise which courts lack in administering such programs, and that scarce

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judicial resources should not be used in supervising enforcement of federal contract compliance programs unless it became necessary. See 553 F.2d 459 at 474-475.3/

The practicality of pursuing any of the above remedies, particularly contract termination, is a matter GSA should consider in light of the circumstances surrounding each of the various contracts which do not contain the required subcontracting plan requirements. In this regard, contract termination does not appear to be a realistic remedy since generally the utilities in question are monopoly suppliers.

IV. Improper Alteration of Regulatory "Flow Down" Clause

We also have been asked whether GSA and SBA, at any time, altered the "flow down" clause required by relevant sections of the FAR in an illegal or inappropriate manner. In this connection, we are asked what remedies are available to GSA or the government, generally, to remedy previously executed contracts that may contain "flow down" clauses that are inconsistent with FAR.

The so-called "flow down" clause, contained in FAR, 48 C.F.R. § 52.219-9, provides that each subcontracting plan required by 15 U.S.C. § 637(d) must include:

"(9) Assurances that the offeror will include the clause in this contract entitled 'Utilization of Small Business Concerns and Small Disadvantaged Business Concerns' in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror." (Emphasis added.)

3/ Concluding a series of appeals involving the district court's determination of the threshold issue of the legality of an administrative search, the Court of Appeals ultimately reversed the trial court's findings and vacated its general injunctive order. The Appeals Court found, as a matter of law, that those administrative searches violated the utility's Fourth Amendment rights. See 723 F.2d 422 at 432.

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The clause is required to be included in both prime contracts and subcontracts. It requires subcontractors that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) from contractors subject to the statutory subcontracting plan requirements, to adhere to those same requirements and adopt similar subcontracting plans. See also, FAR, 48 C.F.R. §19.704(a)(4).

Federal Procurement Regulation (FPR), Temporary Regulation No. 50, dated June 20, 1979,^{4/} contained the predecessor to the current flow down clause in FAR, requiring that each subcontracting plan include:

" . . . [a]ssurances that the offeror will include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts which offer further subcontracting opportunities and to require all subcontractors (except small business concerns) which receive subcontracts in excess of \$500,000, or in the case of a contract for the construction of any public facility, \$1,000,000, to adopt and comply with a plan similar to the plan agreed to by the offeror. Such assurances shall describe the offeror's procedures for the review, approval and monitoring for compliance with such plans" (Emphasis added.)

Based on this provision of the FPR, GSA formulated a standard clause which it intended to incorporate in all utility contracts. GSA's clause contained the following language:

"[Name of company] will include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts of \$10,000 or more, which offer further subcontracting opportunities, and will insert a provision in its subcontracts which will require all subcontractors (except small business concerns) who receive

^{4/} The regulation was extended on May 23, 1980. See FPR Temp. Reg. No. 50, Supplement 2.

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subcontracts of \$500,000.00 or more, which offer further subcontracting opportunities to adopt a plan similar to the plan in accordance with the requirements of Public Law 95-507, 15 U.S.C. 637."
(Emphasis added.)

However, some utility firms would not accept the above language because they believe it to be so broad that it would be construed as applying to a utility's entire operations. According to GSA, in order to gain the utilities' acceptance of a subcontracting plan and to obtain contracts for utility services, GSA requested and obtained approval from the Small Business Administration (SBA) to revise GSA's flow down clause. SBA approved, and the revised flow down clause was drafted to read:

"[Name of company] will include the clause entitled Utilization of Small Business Concerns and Small Business Concerned Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts of \$10,000 or more, which offer further subcontracting opportunities. [Name of company] will insert a provision in its subcontracts which will require all subcontractors (except small business concerns) who receive subcontracts to construct or operate facilities directly pertinent to serve the Government of \$500,000.00 or more, which offer further subcontracting opportunities, to adopt a plan similar to the plan in accordance with the requirements of Public Law 95-507, 15 U.S.C. 637."

Where the language of the FPR's and GSA's original flow down clauses covered "all" subcontractors (except small businesses) receiving subcontracts in excess of \$500,000, the revised flow down clause covers, by its terms, only subcontractors receiving subcontracts in that dollar amount "to construct and operate facilities directly pertinent to serve the government."

With regard to the revision of the flow down clause, GSA initially had taken the position that its actions were authorized under federal procurement regulations. It stated that FAR, 48 C.F.R. Subpart 8.3, allows agencies acquiring utility services to continue use of policies and procedures predating the effective date of FAR, April 1, 1984, through September 30, 1986. GSA had claimed that negotiations for the contracts containing the revised flow down clause were

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initiated before April 1, 1984, and therefore the FPR in effect at that time applies to these contracts.^{5/} It is not clear from the record before us whether GSA actually obtained what it considered a proper deviation from the language of its original flow down clause, although the record does indicate that GSA proceeded to alter that language on the assumption that such a deviation could be obtained.

^{5/} Pacific Gas and Electric Company (PG&E) contract No. GS-00P-BS-D-0002 is the contract most frequently mentioned in the documents we reviewed, and appears to be representative of the contracts in question. Although the documents do not indicate the specific date on which GSA either began negotiations for or awarded this contract, we assume that both events occurred after the October 24, 1978, passage of the statutory subcontracting plan requirements and after the June 20, 1979, adoption of the implementing regulations in the FPR. Our assumption is based in part on correspondence indicating that GSA initially requested SBA approval of the revised flow down clause on January 31, 1984. See Letter from John L. Stanberry, Assistant Commissioner, Office of Public Utilities, Public Building Service, GSA, dated January 31, 1984, to Gene Van Arsdale, Deputy Associate Administrator for Procurement and Technical Assistance, SBA. In addition, GSA has stated that its negotiations for the PG&E contract were initiated prior to April 1, 1984, but does not claim to have entered into such negotiations before either October 24, 1978, or June 20, 1979. See Letter from Patricia A. Szervo, Associate Administrator for Policy, GSA, dated September 24, 1986, to Honorable Parren J. Mitchell, Chairman, Committee on Small Business, U.S. House of Representatives. In addition, it appears from the record that other contracts containing the revised flow down clause were also negotiated after adoption of the implementing regulations.

Significantly, GSA began negotiating the contracts in question after the implementing regulations were adopted, since our decision in B-114835, October 19, 1979, held that federal agencies were not required to obtain compliance with the statutory subcontracting plan requirements until implementing regulations were subsequently issued.

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In any event, both GSA and SBA subsequently have acknowledged that it was improper to approve and use the revised flow down clause. In a letter dated October 16, 1986, replying to inquiries by the Chairman, House Committee on Small Business, regarding the use of the revised clause, SBA's Acting Administrator acknowledged that GSA's use of the clause violated the FPR then in effect. The Acting Administrator stated:

"We have reviewed the correspondence between GSA and the Small Business Administration (SBA) on this matter and found that in 1984 GSA did request approval of contract language differing from that prescribed by the Federal Procurement Regulations (FPR). The substitute language was directed toward reassuring industry that all contractual actions throughout their firms were not automatically included under the subcontracting plan required for a particular contract. I am told SBA was persuaded that such a change would have favorable results for small and small disadvantaged business, since it would result in obtaining the subscription of monopoly utilities to small and small disadvantaged business subcontracting programs. I understand SBA also believed that the proposed language would achieve the purpose of Public Law 95-507, since the program was, in part, directed toward actual subcontracts with inclusion of indirect expenses being at the discretion of the contractor. SBA, therefore, concurred in the language proposed by GSA.

"As you state, SBA and GSA could not effect a change to the regulations. SBA's concurrence was premised on the assumption that proper clearances for deviation from standing regulations would be obtained. The flaw in proceeding was the failure of SBA to include such cautions in its letter of agreement to GSA. The attention of all personnel in the Office of Procurement Assistance has been

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directed to this matter and I am confident that this occurrence would not be repeated today."6/
(Emphasis added.)

SBA and GSA were without authority to effect the questioned change in the flow down clause. Inclusion of the flow down clause in government contracts is specifically required by 15 U.S.C. § 637(d)(6)(D), which clearly imposes on contractors the following obligation:

"(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,000,000 in the case of a contract for the construction of any public facility, or in excess of \$500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5)."

In this regard, the cited FPR provision and GSA's original flow down clause, as well as FAR, 48 C.F.R. § 19.704(a)(4), reflect this statutory language and thereby implement the statutory requirements contained therein. In the absence of a specific statutory provision granting the necessary authority, government officials do not have the authority to waive statutory requirements. See M-R-S Manufacturing Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974) (Truth-in-Negotiation Act requirements); Singer Co., Librascope Div. v. United States, 576 F.2d 905 (Ct. Cl. 1978); 53 Comp. Gen. 620 (1974).

6/ See Letter of Charles L. Heatherly, Acting Administrator, SBA, dated October 16, 1986, to Honorable Parren J. Mitchell, Chairman, Committee on Small Business, U.S. House of Representatives.

In addition, SBA's Regional Administrator, in replying to the same inquiry, stated that the revised clause "does not fully meet the intent of Public Law 95-507." See Letter from Thomas Topuzes, Regional Administrator, GSA, dated November 21, 1986, to Honorable Parren J. Mitchell, Chairman, Committee on Small Business, U.S. House of Representatives.

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GSA's revision of the flow down clause clearly limited the application of the subcontracting plan requirements in a manner inconsistent with the scope of coverage expressly provided in the statute. There is no authority in Public Law 95-507 or the Federal Property and Administrative Services Act that permits GSA to waive any part of the subcontracting plan requirements. Therefore, GSA's alteration of the flow down clause constituted an unauthorized waiver of those statutory requirements as they pertain to "all" subcontracts in excess of \$500,000. GSA's actions thus violated the requirements of the FPR as well as the current provisions of FAR, at 48 C.F.R. § 19.704(a)(4). Whether GSA had actually secured a deviation for its action under the FPR or altered the flow down clause on the assumption that a proper deviation under those regulations could have been secured is, in our view, irrelevant, since GSA possessed no authority to waive the requirements concerning the subcontracting plans, and a deviation under those regulations does not constitute such statutory authority.^{7/}

We also were asked to specify the remedies available to GSA or the government, generally, with regard to previously executed contracts that may contain revised flow down clauses. In our view, the remedies available in this situation are the same remedies available to the government where utility contracts were executed without any of the statutory subcontracting plan requirements, i.e., contract modification, contract termination, or possible judicial enforcement to compel contractor compliance with the statutory flow down clause requirement.

^{7/} The language of the FPR was general in nature, and provided that in individual cases deviations could be authorized by an agency head or someone under their control; the nature of and reasons for the deviation were required to be documented. See 48 C.F.R. § 1-1.009-2(b), rev. July 1, 1978. Currently under FAR, deviations cannot be granted where "precluded by law." See 48 C.F.R. § 1.402, rev. October 1, 1986.

NOT FOR PUBLICATION UNTIL RELEASED
BY THE HOUSE COMMITTEE ON SMALL BUSINESS

STATEMENT OF
VICE ADMIRAL WILLIAM H. ROWDEN, U.S. NAVY
COMMANDER, NAVAL SEA SYSTEMS COMMAND
BEFORE THE
HOUSE COMMITTEE ON SMALL BUSINESS
ON
SMALL BUSINESS SUBCONTRACTING PROGRAM

6 JULY 1988

NOT FOR PUBLICATION UNTIL RELEASED
BY THE HOUSE COMMITTEE ON SMALL BUSINESS

VICE ADMIRAL WILLIAM H. ROWDEN, USN

Vice Admiral William H. Rowden was born in Woodsville, New Hampshire, on 12 May 1930. He attended the U.S. Naval Academy, graduating with the class of 1952. After graduation he was assigned to USS YARNALL (DD 541), a FLETCHER class destroyer, operating with the U.S. SEVENTH Fleet in support of United Nations actions in Korea. In 1954 he became the Executive Officer of the coastal minesweeper, USS CORMORANT (MSC 122). He relieved as Commanding Officer in CORMORANT in late 1955 taking that ship to her new homeport in Sasebo, Japan, from Long Beach, California.

An assignment to the Bureau of Naval Personnel in Washington, D.C., followed before returning to sea as Executive Officer of USS LESTER (DE 1022). He earned a Bachelor of Science Degree in Electrical Engineering in 1963 from the U.S. Naval Postgraduate School in Monterey, California. He then assumed command of USS BAUER (DE 1025) which operated in the South China Sea as a unit of the U.S. SEVENTH Fleet during the early part of the Navy's involvement in the Vietnam conflict.

He served as Personal Aide to the Commander in Chief Pacific from 1965 to 1967 and then spent six months as a student at the Armed Forces Staff College in Norfolk, Virginia, before assuming command of USS LYNDE MCCORMICK (DDG 8). Following an assignment to the Naval Ordnance Systems Command in the Surface Missile Systems Project in Washington, D.C., Vice Admiral Rowden returned to sea in August 1973 as Commanding Officer, USS COLUMBUS (CG 12). From USS COLUMBUS, Vice Admiral Rowden was assigned to the staff of the Chief of Naval Operations in 1974. He served for two years in the Office of the Deputy Chief of Naval Operations (Surface Warfare) in the Surface Combat Systems Division (OP-35).

Vice Admiral Rowden then commanded Cruiser-Destroyer Group THREE from July 1977 to May 1979. He returned to the office of Chief of Naval Operations in June 1979. He became Deputy Chief of Naval Operations (Surface Warfare) in September 1980. He commanded the United States SIXTH Fleet in the Mediterranean from June 1981 until July 1983. During this period he was also assigned to NATO as Commander Striking and Support Forces, Southern Europe. He assumed command of the Military Sealift Command from August 1983 until June 1985. He became Commander, Naval Sea Systems Command, on 17 June 1985.

Mr. Chairman, I appreciate the opportunity to appear before the Small Business Committee and discuss the small business subcontracting program implemented at the Naval Sea Systems Command (NAVSEA). Small business and small disadvantaged business concerns have continued to play a crucial role in building and supporting our naval forces. NAVSEA contracts directly with many small business and small disadvantaged business firms, both at the Headquarters and at our field activities located throughout the United States. Additionally, NAVSEA strongly supports the small business subcontracting program, established pursuant to section 8(d) of the Small Business Act as amended by section 211 of Public Law 95-507.

You requested that my statement address several items concerning NAVSEA's implementation of the small business subcontracting program. The following paragraphs provide this information.

Subcontracting program goals for small business and small disadvantaged business firms are provided to NAVSEA by the Secretary of the Navy, with actual subcontracting program attainment reported by prime contractors assigned to NAVSEA for contract administration. The subcontracting goals represent that portion of a prime contractor's total planned subcontracts which are to be awarded to small and small disadvantaged business concerns. As can be seen from the following chart, combined small business/small disadvantaged business subcontracting performance on NAVSEA-administered contracts has exceeded assigned goals since FY 85.

<u>FISCAL YEAR</u>	<u>NAVSEA GOAL</u>	<u>ATTAINMENT</u>
FY 85	39.10%	38.13%
FY 86	38.00%	40.92%
FY 87	39.00%	46.20%
FY 88 (Thru 2nd QTR)	41.00%	42.06%

During August 1987, the General Accounting Office (GAO) conducted an audit of contract actions awarded by NAVSEA Headquarters in excess of \$500,000. Of the 296 NAVSEA contracts and contract modifications reviewed by GAO, 30 valued at \$153 million were identified as missing the required small business subcontracting plan. These 30 contract actions represent

about 1 percent of the \$13 billion in contracts awarded by NAVSEA Headquarters during FY 86 when most of these actions were taken. Our review of the 30 contract actions indicated that 21 were modifications to existing contracts awarded during FY 81 through FY 86 that already had small business subcontracting plans in place. The modifications should have caused these existing plans to be updated and the contract files appropriately documented. The remaining nine cases were basic contracts awarded during FY 85 and FY 86 that should have included small business subcontracting plans. Subsequently, all contracts and contract modifications have been amended to include subcontracting plans, except contracts on which performance was already physically complete. And, one contract questioned was issued to a small business concern.

The GAO report also included comments concerning the "size" of subcontract goals, contractor achievement against the goals, and remedial actions "for substantial nonperformance of subcontracting plans." Comment on these issues would require a case by case analysis. The report does not identify the contract or contract modifications which are, apparently, in contention.

As a result of this review, and to emphasize the need for future compliance with regard to the small business subcontracting program, we have implemented revised internal controls to ensure inclusion of subcontracting plans, where required, for actions in excess of \$500,000. This is being accomplished by use of a standardized NAVSEA form which requires the Contracting Officer to coordinate through the Command Small and Disadvantaged Business Utilization office in making a positive determination of compliance with subcontracting plan requirements. The form also ensures incorporation of the resultant subcontracting plan into the contract prior to award.

Recent Navy-wide actions will also assist NAVSEA with maintaining subcontracting plan compliance. For your information, they include:

- subcontracting plan compliance has been established as an item of special interest in Navy-wide Procurement Management Reviews;
- the Navy's Small Business/Labor Surplus Set-Aside Review form was revised to incorporate a special section calling attention of the

Contracting Officer to subcontracting plan obtainment/review requirements; and

- a revision to Navy acquisition plan preparation guidance is in process which will require discussion of subcontract planning, involving small and small disadvantaged business subcontract plan goals.

In addition, in order to validate NAVSEA subcontracting plan requirements for contracts awarded since completion of the GAO audit, we recently conducted an internal review of all NAVSEA Headquarters contracts which required a subcontracting plan and were awarded on or after implementation of the revised internal controls mentioned earlier. This review included 232 contract actions awarded from 9 September 1987 through 31 May 1988. For all new contracts, we found that plans have been incorporated. However, in the case of the exercise of options, all basic plans were not properly updated and we are taking additional actions to correct this deficiency.

During Fiscal Years 1986 and 1987, no cure notices or remedial contract actions were taken as a result of a prime contractor's failure to include or execute properly a valid subcontracting plan. For contracts missing the required subcontracting plan, actions have been completed to obtain, review, and incorporate the necessary subcontracting plan into all contracts which were not physically completed.

Effective incentive clauses used in conjunction with subcontracting plan goals have proven extremely difficult to both formulate and administer. These clauses are intended to motivate the prime contractor to increase subcontract awards to small business and small disadvantaged business concerns. To be effective, a contractor's current small and small disadvantaged business subcontracting levels must be baselined as a measuring point. For repetitive procurements of identical items from a contractor, a baseline can be established. Given the complexity of many of our NAVSEA weapon systems procurements, quantification of previous contractor performance for incentive purposes has not been possible.

No subcontracting program incentive clauses were included in NAVSEA contracts during FY 86 and FY 87. The 30 NAVSEA contract actions identified in the GAO audit as containing subcontracting program incentive clauses have been reviewed and do not include incentive provisions for the

subcontracting program. These contracts were improperly coded for input to the master data file, and actions to correct these coding errors are in process.

Training of acquisition personnel on assessment of subcontracting plans is an ongoing effort at NAVSEA which involves both formal and on-the-job instruction. The requirement for evaluation of a subcontracting plan, detailed review of the goals and subcontracting opportunities, and contract incorporation and monitoring procedures are addressed in both formal procurement courses and on-the-job training.

Subcontracting opportunities vary substantially for each procurement and each prime contractor, thereby requiring an individualized assessment of subcontracting opportunities for each procurement. Upon completion of this assessment, a determination is made by the Contracting Officer as to whether the subcontracting goals provided by the prime contractor in the subcontracting plan present the maximum practicable opportunity for small and small disadvantaged business subcontracting. Plans obtained by the Contracting Officer are then subjected to review by our Commands' small and disadvantaged business utilization personnel.

In conclusion, Mr. Chairman, the Naval Sea Systems Command will continue to strongly support the critical small business and small disadvantaged business base through both direct prime contract awards and the subcontracting program. The recent GAO audit identified a problem involving a small percentage of the NAVSEA contract actions which is being corrected. An effective program is in effect for compliance with the subcontracting program requirements and which, when combined with ongoing Navy-wide initiatives, will effectively serve to assist in the obtainment of maximum practicable subcontracting opportunities for small business and small disadvantaged business concerns.

NOT FOR PUBLICATION UNTIL RELEASED BY
THE COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

STATEMENT OF
VICE ADMIRAL JOSEPH B. WILKINSON
COMMANDER
NAVAL AIR SYSTEMS COMMAND
BEFORE THE
COMMITTEE ON
SMALL BUSINESS
OF THE
HOUSE OF REPRESENTATIVES
ON THE
IMPLEMENTATION
OF
THE SMALL BUSINESS SUBCONTRACTING PROGRAM
(JULY 6, 1988)

NOT FOR PUBLICATION UNTIL RELEASED BY
THE COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

VICE ADMIRAL JOSEPH B. WILKINSON, USN

Admiral Wilkinson graduated from the Naval Academy in June 1962. He holds a Bachelor of Science Degree from the Naval Postgraduate School and Master of Science Degrees in Aeronautics and Astronautics from the Massachusetts Institute of Technology and in International Relations from The George Washington University.

After a year aboard a heavy cruiser, he entered flight training and received his wings in October 1964. He later served in two A-1 Skyraider squadrons, Fighter Squadron NINETY-TWO at Naval Air Station, Miramar and Attack Squadron NINETY-SIX at Naval Air Station, Moffett Field, with Western Pacific deployments on USS SHANGRI LA and USS KEARSARGE. From 1961 to 1964 he served with Attack Squadron SEVENTY-TWO, flying A-4 Skyhawks at Naval Air Station, Oceana and embarked on USS INDEPENDENCE. He later served as Executive Officer of Attack Squadron NINETY-FOUR, with combat deployments in Southeast Asia aboard USS HANCOCK and USS BON HOMME RICHARD in 1967 and 1968.

Shore assignments include duty on the staff of Commander, Operational Test and Evaluation Force in 1964 and 1965, attending the Armed Forces Staff College in 1966, the National War College in 1971, and as Assistant Chief of Staff for Plans and Programs for the Chief of Naval Education and Training from 1976 to 1978.

He became involved in material acquisition in 1968 when assigned to the Naval Air Systems Command as the Navy Deputy Project Manager, F-14B/F-15 Joint Engine Project, Wright-Patterson Air Force Base. In August 1972 he became the Naval Air Systems Command Project Manager for the A-6 and EA-6 aircraft programs and served in that capacity for four years.

He served as Deputy Chief of Naval Education and Training, then returned to Washington as Deputy Commander for Plans and Programs in the Naval Air Systems Command Headquarters. In September 1982 he assumed command of the Pacific Missile Test Center, Point Mugu, California. On his return to Washington in August 1984 he began service as Vice Commander, Naval Air Systems Command, and was selected for Vice Admiral in August 1985.

Vice Admiral Wilkinson assumed his current position as Commander, Naval Air Systems Command in August 1985.

Awards include the Legion of Merit, the Distinguished Flying Cross, the Bronze Star, 27 Air Medals, and three Navy Commendation Medals.

Mr. Chairman, members of the Committee. I want to thank you for inviting me to appear before this committee to review the Naval Air Systems Command's implementation of the Small Business Subcontracting Program which was established pursuant to Section 8(d) of the Small Business Act, as amended by Section 211 of Public Law 95-507.

The Naval Air Systems Command (NAVAIR) is responsible for the acquisition of aircraft, engines, missiles and systems in support of our Navy and Marine Corps operating forces. The complex products we acquire are manufactured principally by the nation's largest corporations which have developed the special facilities, skills and capabilities to produce and perform the extremely complex function of integrating sophisticated weapons systems. Many of the subsystems and components are produced by our nation's small business firms.

We at NAVAIR are proud of our accomplishments and initiatives in promoting small business prime contracting and subcontracting opportunities. In the current fiscal year, we expect to award approximately 300 million dollars to small business firms directly. This includes the award of about 98 million dollars directly to small disadvantaged business firms. Of perhaps even greater significance, through April 1988, 27.6% of all subcontracting dollars under our prime contracts which we administer is going to small business firms. These

results have been brought about through the efforts of our Command's contracting officers and small business personnel working with industry. It involves the detailed review of small business subcontracting plans, make-or-buy plans and special initiatives. Most importantly, results are motivated by our consideration of a contractor's small business performance in negotiating profits.

Recently, the Naval Air Systems Command initiated a pilot program to increase small disadvantaged business participation at the subcontract level on our major programs. For example, in our negotiations of the Fiscal Year 1988 F/A-18 aircraft, we provided \$250,000 as part of the negotiated price for the prime contractor to develop a small disadvantaged business second source for a Video Relay Panel, a complex state-of-the-art electronics sub-system, which has annual requirements on the F/A-18 alone approaching 2 million dollars. This will provide a small disadvantaged business the opportunity to develop a capability involving new sophisticated technology with significant spin-off potential. It will also provide us with a qualified, second source for this aircraft subsystem. We intend to work closely with our prime contractor in monitoring progress on this subcontract and to seek similar opportunities on other programs. In general, we at NAVAIR have been promoting small business and specifically the small Business Subcontracting Program aggressively. Although it was reported by the General Accounting Office (GAO) that 52 NAVAIR contracts and contract modifications

did not have a subcontracting plan, we reported in April 1988 that of those identified by the GAO, subcontracting plans for 27 had been received, reviewed and incorporated. Most of the other contracting actions questioned involved contract modifications where our Contracting Officer anticipated contractor performance at the level as approved in the subcontract plan incorporated in the basic contract. Our internal procedures should have required such documentation of the contract file. Our further review pointed out several administrative deficiencies that we have taken action to correct, including the establishment of positive controls to insure that a subcontracting plan has been reviewed and approved prior to the award of definitive contracts or prior to definitization of advance acquisition contracts or ceiling priced modifications.

Mr. Chairman, in your letter of 17 June 1988 you asked that I address several specific areas. My comments on each of these areas are as follows:

a. Regarding our response to the GAO report (GGD-88-83), captioned "Compliance with Subcontracting Requirements at GSA, Energy and Navy," we reviewed the contract file for each contract identified as not having a small business subcontract plan. As I have just mentioned, 27 of the 52 cases where it was reported the plans were "overlooked," the plans have been received, reviewed and incorporated into the contracts or the modifications. Most

of the other cases involved contract modifications where our Contracting Officers anticipated performance at the same level as approved in the plan incorporated in the basic contract. Our internal procedures should have required the file to be documented to this effect. We have subsequently revised our procedures and provided training to our Contracting Officers to insure that separate plans are received for modifications or that the file is properly documented where an additional plan is not required.

b. The estimated dollar value of those contracts that should have had plans was approximately \$110 million, excluding those contracts or contract modifications for which plans were obtained when the contracting actions were definitized after the GAO review of the file. This compares to approximately 14 billion dollars in total contract obligations at NAVAIR contracting offices last year.

c. The NAVAIR Assistant Commander for Contracts has taken action to establish strict controls to insure that small business subcontract plans are reviewed and implemented in contracts or contract modifications, and that the file is documented appropriately when a plan is not required. To this end, we have included critical performance factors in personnel evaluation reviews and have established specific procedures to review each contract or modification at the time of award or definitization.

d. Although we have not issued any cure notices, we have held up contract award pending submission of an acceptable subcontracting plan on numerous cases in the past two years. Some examples include: H-1 Night Targeting Systems (Bell Helicopter), H-53 Night Vision Systems (Sikorsky), A-6 Wing replacement (Boeing). These instances have caused us to address small business subcontracting requirements to the Chief Executive Officers of our major prime contractors.

e. In no instances in the last two years have incentive clauses, per se, been used in conjunction with subcontracting plans. However, at NAVAIR, a contractor's past performance in subcontracting with small business is considered both in evaluating proposals for future awards as well as in negotiating profit objectives.

f. The average small and small disadvantaged business subcontracting goal and this Command's accomplishments against the goal over the past four year period are as follows:

FY	Goal	Accomplishments
85	25.3%	24.9%
86	25.0%	25.73%
87	25.7%	29.4%
88	27.0%	27.6% (through April 1988)

g. Training continues to be provided at all levels. The Command's associate director of Small Business attends all Contracts Directorate staff meetings where ongoing progress is reviewed. Each Contracting Officer has attended professional training courses on small business contracting and, periodic training is conducted to highlight changes to small and disadvantaged business procedures.

In order to validate NAVAIR's compliance with subcontracting plan requirements for contracts awarded since completion of the GAO audit, we recently conducted an internal review of all our Headquarters contracts which required a subcontracting plan and were awarded on or after implementation of the revised internal controls mentioned earlier. This review included actions awarded from 1 October 1987 through 31 May 1988. For all new contracts, we found that we have complied with the statute. However, in the case of contract modifications, all basic plans were not properly updated. We are taking actions to ensure that incomplete plans are obtained or the file is properly documented with contracting officer certifications.

I can assure you Mr. Chairman and Committee members, that we do not take our responsibilities to small business lightly. I believe our program is sound and viable and we are making every effort to make it even better. We have strengthened the administrative process and instituted the proper controls. We

intend not only to hold Contracting Officers accountable for compliance with applicable laws and regulations but also with achieving improved small business subcontracting opportunities on our major programs.

STATEMENT OF RICHARD H. HOPF
BEFORE THE COMMITTEE ON SMALL BUSINESS
OF
THE HOUSE OF REPRESENTATIVES

Mr. Chairman, I am Richard H. Hopf, Deputy Associate Administrator for Acquisition Policy for the General Services Administration. I appear before you today to respond to questions concerning the General Services Administration's implementation of the small and small disadvantaged business subcontracting program established by section 8(d) of the Small Business Act, as amended by Section 211 of Public Law 95-507.

I am accompanied by Mr. Lou DeProspero, Assistant Commissioner of GSA's Federal Supply Service and Mr. Brian Polly, Assistant Commissioner of GSA's Public Buildings Service.

The General Services Administration is generally pleased with its record of implementation of the Small Business Act in general, and of section 8(d) of the Act, in particular. For example, in fiscal year 1987, GSA set aside for small business contracts valued at approximately \$2 billion. This represented over 40% of the value of all GSA procurements and exceeded the goal approved by the Small Business Administration. With respect to the section 8(d) subcontracting program, GSA achieved a combined small and small disadvantaged subcontracting attainment representing 33.8% of the value of the total subcontracting subject to the program. This achievement also exceeded the goals established for the agency.

Recently, GSA received from the General Accounting Office a draft report summarizing its review of GSA compliance with section 8(d) requirements. We believe the results to be favorable, in that they show that fewer than 1% of the total number of contracts reviewed failed to comply with the program's requirements. The agency's failure in those few cases was not the result of neglect or oversight, but rather a misunderstanding as to how dollar value is to be determined in a multi-year contract for purposes of applying the section 8(d) subcontracting plan requirement.

Since inception of the subcontracting program, however, GSA has faced a difficult challenge in implementing section 8(d) with respect to public utility contracts. Historically many utility companies have been reluctant to enter into Government contracts containing clauses which require subcontracting plans. Given the sole source nature of the industry GSA has been at a disadvantage. Nonetheless, a great deal of progress has been made. In 1980 GSA's Public Buildings Service obtained only one public utility subcontracting plan with a small business subcontracting goal of \$85,000. Today, PBS has achieved utility contracts containing 65 plans representing a value of \$2 billion committed by the companies to subcontracting with small business on a company-wide basis.

Mr. Chairman, I have appended to GSA's formal statement answers to twelve specific questions raised by your letter of June 17, 1988. Mr. Polly, Mr. DeProspero and I will be happy to try to answer any further questions the Committee may have.

Response of the General Services Administration to Specific
Questions Raised by the Committee on Small Business, House of
Representatives

GENERAL

1. Question: Your response to a General Accounting Office Report (GGD-88-83) captioned "Compliance with Subcontracting Requirements at GSA, Energy, and Navy."

Answer: On March 7, 1988, GSA received a draft General Accounting Office (GAO) report entitled "Compliance with Subcontracting Requirements at GSA, Energy, and Navy." The report summarized a briefing given to the Committee on November 10, 1987, of GAO's review of the three agencies' implementation of Section 211 of Public Law 95-507. GSA's formal response to the draft report is contained in Attachment A. GSA is generally pleased with the conclusions reached by GAO concerning its compliance with the law. In brief, GAO found that in the vast majority of cases, GSA contracts which should have contained small and small disadvantaged subcontracting plans did so. GAO reviewed 968 contract actions which exceed the \$500,000 applicability threshold and which were awarded during an 18 month period ending in March 1987. Of those, GAO identified only 11 contract actions which failed to contain plans without a valid reason. Upon closer inspection of the 11 contracts we have found that only 9 or less than 1% of the contracts reviewed, actually failed to contain plans when they actually should have. The reason for the failure was identified in each case as a misunderstanding of the dollar value of the contract by the contracting officer for purposes of applying the requirements of the law. Each of the contracts in question was a multi-year contract and the contracting officer mistakenly applied the dollar criteria on an annual basis. GAO also noted that of the total number of GSA contracts which did not contain plans over 80% were exempt from the requirement because they were awarded to small businesses. GAO further concluded that, for the most part, subcontracting goals were being achieved at all three agencies.

2. Question: The estimated dollar value of those contracts designated in the referenced GAO Report that should have had plans but, in fact, did not.

Answer: The estimated value of the 9 contracts which did not contain plans but should have is \$2,391,600 on an annualized basis or \$6,385,000 on a multi-year basis.

3. Question: The disciplinary action or other remedial measures under consideration as a result of cognizant personnel failing to include the required plans in the contracts referenced in the report.

Answer: Under the circumstances, no disciplinary action is appropriate. The contracting officers involved are exemplary employees and merely misinterpreted the method used to determine contract value for purposes of application of P.L. 95-507. GSA has, however, taken steps to remedy the situation by negotiating with the affected contractors to obtain acceptable subcontracting plans. Additionally, GSA has instructed each of the contracting officers involved as to the appropriate method of determining multi-year contract dollar value and issued a general instructional letter to clarify the matter.

4. Question: The number of times, over the last two (2) year period that cure notices or other remedial contract actions have been taken or contemplated as a result of a prime's failure to include or execute properly a valid subcontracting plan. Please explain each such occurrence.

Answer: GSA is not aware of any instance during the last two years that a "cure notice" has been issued as a result of a prime contractor's failure to provide an acceptable subcontracting plan. The issuance of a "cure notice" is a contract administration action which occurs subsequent to contract award, where the contractor has failed to comply with the terms of the contract. Subcontracting plans are obtained and their acceptability is determined prior to award. Accordingly, it is difficult to see how a "cure notice" would work in the pre-award environment. Although GSA contracting officers are usually successful in negotiating acceptable plans, the appropriate response to an otherwise successful offeror's refusal to do so is to make no award. GSA's Federal Supply Service has identified one recent case where such action was in fact taken. GSA's Public Buildings Service has reacted similarly in a number of cases involving public utilities.

In the post-award environment subcontracting plan performance problems generally involve a contractor's failure to timely submit required reports. In such a case a contractor may be advised that its contract will be terminated or cancelled if its reports are not received. Attachment B contains an example of the type of action taken by GSA contracting officers to obtain compliance. Additionally, contracting officers have terminated negotiations on new contracts where a report has not been received on the predecessor contract. Specific data regarding the frequency of such actions is not available. Further, we are not aware of any case in which a contract was terminated for default because a contractor failed to meet the standard of a good faith effort to achieve the goals in an approved subcontracting plan. We are also not aware of any situation that required such termination for default action.

5. Question: The number of times over the last two (2) year period that incentive clauses were used in conjunction with subcontracting plans. For each such instance, specify the dollar value of the contract, the amount paid out under the incentive

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provision and the increased level of small or small disadvantaged participation resulting from such incentive payments.

Answer: None. Historically, GSA has not had positive experiences with the use of incentives type clauses as a means of obtaining desired levels of contractor performance. We have found them to be generally ineffective. Given the fact that the agency is meeting or exceeding its subcontracting goals, we see little need for the use of such clauses in this area.

6. Question: The average subcontracting goal, expressed as a percent, for contracts awarded and closed over the last two (2) year period and the average percent attainment against such goals.

Answer: Subcontracting goals are expressed as a percentage of the total subcontracting dollars by prime contractors having contracts subject to the requirements of section 8(d) of the Small Business Act. As the following statistics show, GSA has exceeded its goals in both categories for FY 86 and FY 87.

SMALL BUSINESS

	AGENCY GOAL	AVERAGE GOAL	ATTAINMENT
FY 86	25%	26.3%	32.6%
FY 87	27.1%	23.2%	33.8%

SMALL DISADVANTAGED

	AGENCY GOAL	AVERAGE GOAL	ATTAINMENT
FY 86	1.5%	0.8%	1.8%
FY 87	1.8%	1.1%	2%

7. Question: A description of the training required of acquisition personnel or the guidelines provided them to help assess whether subcontracting goals present the maximum practicable opportunity for small and small disadvantaged business to perform as subcontractors.

Answer: Federal Acquisition Regulation 19.705-4 provides the guidelines for reviewing the adequacy and acceptability of an offeror's subcontracting plan. The regulation states that no detailed standards apply to every subcontracting plan. Instead the contracting officer must consider each plan individually, in terms of the circumstances of the particular acquisitions. Factors that should be considered include: the offeror's "make-or-buy" decisions; the nature of the product or service to be subcontracted; the known availability of small and small disadvantaged business concerns in the local area; and the offerors long-standing contractual relationship with its supplies. The regulation further provides that contractors should not be encouraged to set goals that are not realistic,

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that cannot be met through good faith efforts, or that will substantially increase the cost to the Government.

To assist contracting officers in their task, all subcontracting plans and goals are reviewed by the GSA Small Business Technical Advisors and the Small Business Administration Procurement Center Representatives. These officials evaluate all aspects of the plans, including goals, and provide guidance and recommendations to the contracting officers as needed.

PUBLIC UTILITIES

1. Question: The names and locations of utility companies that have refused to enter into a contract with the Government due to the requirements of section 8(d) of the Small Business Act.

Answer: Enclosure C lists 11 companies with copies of letters from utility firms that directly cite this law as being the primary reason for their refusal to execute public utility service contracts with the Federal Government. Enclosure D lists 14 companies with copies of letters by these public utility companies that have cited standard Government contract clauses, generally, as the reason for their refusal to execute a Government contract. These firms were requested to submit subcontracting plans for small and small disadvantaged businesses. Although not specifically cited, the demand for the plans may have contributed to the companies' refusal to execute formal contracts.

2.&3. Question: The efforts made by GSA to secure the cooperation of such contractors and an explanation of why judicial enforcement has not been attempted by the agency; and any attempt made to secure an opinion from the Justice Department with respect to such refusal and a copy of Justice's opinion.

Answer: The public utility industry is generally monopolistic. This is particularly true of the electric utility industry, where companies franchised by state licensing organizations are statutorily mandated sole sources of supply and service for most Federal agencies. Given this market environment and the necessity of the service provided by these companies, the Government's leverage in negotiating the terms and conditions for utility contracts is limited. Since enactment of P.L. 95-507 GSA has attempted to obtain the contractual agreement of public utilities to conform with its requirements. Historically GSA has relied on education and the powers of persuasion to obtain agreements. Over the years, results have generally been positive. However, as previously stated, a number of utility companies remain reluctant to execute standard Government contracts containing the clauses required by section 8(d) of the Small Business Act.

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Judicial enforcement has not been an obvious recourse. Section 8(d) of the Act requires the inclusion of certain clauses in certain Government contracts. It does not, however, compel contractors to enter into such contracts with the Government. Absent such a contract, there is nothing to enforce.

Recently, however, GSA requested the opinion of the Department of Justice, Office of Legal Counsel, as to whether a public utility which sells to the Government under a state tariff, but refuses to enter into a formal Government contract, is nonetheless legally required to meet the requirements of section 8(d) of the Act. The Office of Legal Counsel concluded that the requirements of the section are implied by law in such cases regardless of whether they are in a formal written agreement (Enclosure E). Since its receipt, GSA has used the opinion to persuade utility companies to conform to the law's requirements. To date, we have not attempted judicial enforcement.

4. Question: A copy of any and all internal memoranda or memoranda or letters with other department or agencies discussing the refusal of utilities to enter into contracts containing 8(d) plans.

Answer: See Enclosures C and D. Enclosure F contains a copy of a GSA memorandum dated February 5, 1982, discussing Southwest Gas Corporation's contention that only its Federal customers should pay the costs of implementing Public Law 95-507 would be a clear instance of discriminatory rate making. Also enclosed is a letter that was sent to the Federal customers of Public Service Electric and Gas Company of New Jersey (PSE&G) requesting their assistance in convincing PSE&G to meet the requirements of the law and execute the contract. The massive letter campaign was successful and PSE&G submitted a subcontracting plan for small and small disadvantaged business concerns value at \$87 million per year.

In addition to the enclosed documents, it should be noted that this issue, among others, was discussed by a GSA official appearing as a speaker before the Department of Energy's Annual Utility Conference. GSA shared its methods in obtaining some \$2 billion in annual company-wide small and small disadvantaged business subcontracting from the public utility industry. GSA staff also recently appeared before the Edison Electric Institute's Minority Business Enterprise Conference and gave a presentation to the electric utility small business coordinators about GSA's experiences in implementing P.L. 95-507 in utility contracts.

5. Question: A description of any activities or action taken in conjunction with SBA on this matter that may not have been in accord with section 8(d), regulations or policy letters issued to implement such section.

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Answer: Enclosure F contains a copy of GSA correspondence with SBA concerning a revision to the standard subcontract "flow down" clause for use in public utilities contracts. In its letter dated February 24, 1984, SBA concurred in a revision to the "flow down" clause that was limited to the construction and facilities operation subcontracts directly pertinent to service the Government of \$500,000 or more.

The purpose of the revised clause was to overcome objections raised by public utility companies to the existing clause which would require the flow down of section 8(d) requirements to all subcontracts, company-wide. Since the existing clause proved to be a major impediment to obtaining the agreement of utility companies to the basic requirements of section 8(d) GSA hoped that the revised clause would resolve the problem. In our opinion, the plan proved successful as evidenced by the fact that subcontracting goal achievement for public utilities has increased by almost 400% since the inception of the program. Because of a procedural defect in the process by which GSA's Public Buildings Service deviated from the standard clause, the alternative provision is not currently in use. GSA is reviewing the matter to determine whether a proper deviation may be effected.



General Services Administration
Washington, DC 20405

March 31, 1988

Dear Mr. Fogel:

Thank you for the opportunity to review draft GAO Audit Report #GAO26/GGD-88-.

Our only comment concerns the Federal Supply Service multiyear contracts which did not contain subcontracting plans due to erroneous calculation of the contract dollar values. We have been informed by the Federal Supply Service (FSS) that they became aware of this problem just prior to the study, and that the correct application of contract dollar values in determining whether or not a plan is required has been called to the attention of the supervisors.

We have also been informed that the FSS Procurement Management Division is preparing a notice to all FSS contracting activities on this subject. We will forward a copy to you upon receipt.

In addition, we will request the Office of Acquisition Policy to include an article in the GSA Acquisition News on the correct method of calculating multiyear contract dollar values with regard to subcontracting plans.

Sincerely,

A handwritten signature in ink, appearing to read "John F. Wynn, Jr.", written over a circular stamp.

JOHN F. WYNN, JR.

Director

Office of Small and Disadvantaged
Business Utilization

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
United States General Accounting Office
Washington, DC 20548

ENCLOSURE B

DEC 10 1987

Re: Subcontracting Plan Report

Contract No. GS-00F-94107

Dear Ms. Barker:

The year-end SF 295 Summary Subcontract Reports for FY '87, which was due on or before October 25, 1987, has not been received. This report should summarize subcontracting activity under your company-wide plan for commercial products in effect during the reporting period.

This report must be received within 10 (ten) days from the date of this letter. Failure to do so could result in the cancellation or termination of your present contract and rejection of any future offers. Please forward the enclosed report (SF 295) to my address below:

General Services Administration
Federal Supply Service
Furniture Commodity Center - FCNCS
Washington, DC 20406
Attn: James Reid

We would appreciate your prompt attention in this matter.

Sincerely,

15/

ARTHUR G. HACKNEY
Contracting Officer
Furniture Commodity Center

Ms. Lillian D. Barker
Falcon Products, Inc.
8387 Dielman Industrial
St. Louis, MO 63132

cc: Official File - FCNCS
Reading File - FCNCS
FCNCS:J.REID:gm:12/10/87

Attachment

ENCLOSURE C

INDEX

1. Alaska Electric Light and Power Company
Juneau, Alaska, 99801
2. Arlington County, Department of Public Works
Arlington, Virginia 22201
3. City of Newport News Department of Public Utilities
Newport News, Virginia 23607
4. Leavenworth Waterworks
Leavenworth, Kansas 66048
5. Oklahoma Gas and Electric Company
Oklahoma City, Oklahoma 73101
6. Potomac Electric Power Company
Washington, DC 20066
7. San Diego Gas & Electric Company
San Diego, California 92112
8. The Cleveland Electric Illuminating Company
Cleveland, Ohio 44101
9. The East Ohio Gas Company
Cleveland, Ohio 44101
10. Tucson Electric Power Company
Tucson, Arizona 85702
11. Washington Suburban Sanitary Commission
Hyattsville, Maryland 20781

ALASKA ELECTRIC LIGHT AND POWER CO.

134 N. FRANKLIN STREET



JUNEAU, ALASKA 99801

(907) 586-2222

February 9, 1982

General Services Administration, Region 10
GSA Center
Auburn, Washington 98002

Attn: Donna Hutchens
Chief, Building Services Contracts Branch
Contracts Division
Public Buildings Service

Re: Your letter dated October 30, 1981

The interruptible electric heat rate (Tariff Schedule 25) was developed based on an intensive cost of service study by the firm of CH2M Hill, Bellevue, Washington. This rate was subsequently reviewed and approved by the Alaska Public Utilities Commission. This rate applies to other customers and there are no other rate structures available which would give a better rate.

The 2.5 cents per kwh charge you refer to for sales to Glacier Highway Electric Association was a contract for standby power made with Glacier Highway Electric Association prior to the Snettisham Project providing a reliable source. The contract expired in 1975 and if it were to be renegotiated today would be substantially higher than 2.5 cents per kwh.

From Alaska Electric Light and Power Company's viewpoint, a contract is not needed, but if GSA wants one, we'll sign one per the criteria outlined in our Tariff Rate Schedule 25 - a copy of which is enclosed.

Your request for a sub-contracting plan doesn't seem appropriate as we do not anticipate any sub-contracting being performed in regards to providing this interruptible electrical service to the Federal Building in Juneau. The necessary facilities to supply this power are in place and all that should be involved in the future is meter reading, meter maintenance, billing, etc., by our own employees.

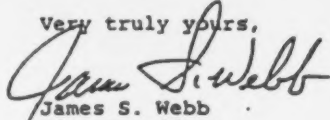
In summary, Alaska Electric Light and Power Company has been ready since October, 1980 to supply electric heat to the Federal Building. The power is to be provided from a

General Services Administration, Region 10
February 9, 1982
Page 2

renewable and clean energy source - the Federal Government's Snettisham Hydroelectric Project-at a net cost far below that of the oil heat presently used. Of the 3.5¢/kwh billed to GSA, 1.56¢/kwh is returned directly to the Federal Treasury through billings for wholesale power sales from the Snettisham Project to Alaska Electric Light and Power Company. The next cheapest rate for commercial or government sales is considerably more expensive than this interruptible rate schedule.

If you have any questions please contact me.

Very truly yours,


James S. Webb
Vice President

Enclosure a/s
CC: William A. Corbus, President, AELP
Robert Cross, Administrator, APA
JSW/ak



H. S. HULME, JR.
DIRECTOR

ARLINGTON COUNTY, VIRGINIA
DEPARTMENT OF PUBLIC WORKS

COURT HOUSE
ARLINGTON VIRGINIA 22201



FEB 10 1981

February 11, 1981

Mr. Larry L. Moreau
Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, D. C. 20406

Dear Mr. Moreau:

Thank you for your letter dated February 9, 1981. Please consider this a "definite and final refusal" to enter into an area-wide contract for sewage disposal so long as those contracts require the implementation of Section 211 of Public Law 95-507.

Should you desire further discussions without the implications of this law, please contact me. As mentioned in our previous correspondence, we shall continue to provide sewage disposal service for federal installations as we have in the past.

Sincerely yours,

H. S. Hulme, Jr.

H. S. Hulme, Jr.

RSH:dch

cc: H. Attkisson, Chief, Utilities Services
Charles Flinn, Deputy County Attorney



C. C. Crowder
Director

City Of Newport News
Department Of Public Utilities

2400 Washington Avenue
Newport News, Virginia 23607

OCT 17 1983

October 14, 1983

Dr. John L. Stanberry
Assistant Commissioner
Office of Public Utilities
General Services Administration
Washington, D. C. 20405

Dear Dr. Stanberry:

In reply to your follow-up letter of August 30, 1983, there are many reasons why an areawide contract with GSA is not desired at this time. Let me quickly express also that I have no new reasons for this position, but can only reiterate some of the salient concerns we have expressed on numerous occasions previously to Mr. Moreau of your organization.

GSA's interpretation that a subcontracting plan must be a condition of an areawide contract is undesirable, especially when this will undoubtedly create additional reports, yet unspecified, plus other unnecessary accounting and reporting costs. The Newport News Waterworks is a municipally owned utility, subject to state and local laws, regulations and ordinances. Accordingly, it is believed there is no need for GSA to impose upon us the so-called subcontracting plan.

Unless the subcontracting plan condition can be removed, we prefer to serve customers individually, in accordance with our established policies.

Yours very truly,

C. C. Crowder
Director

CCC/shj

Leavenworth Waterworks

601 Delaware
Leavenworth, Kansas 66048
(913) 682-1513



10 June 1987

B.K. KANSTEINER, Manager
Production and Distribution

WILLIAM E. DRISCOLL, SR.
Administrative Assistant, P & D

MARCIA K. COSGROVE, Manager
Collections and Accounts

Mr. Larry Henshaw, Contracting Supervisor
U.S. Department of Justice
Federal Prison, System
U.S. Penitentiary
Leavenworth, Kansas 66048-1254

Dear Mr. Henshaw:

We received a copy of the Small Business Administration Regional Office letter on 5 June 1987 followed by your phone inquiry. The change noted, disallowing Leavenworth Water Department status as "Small Business" due to our "non-profit" status, is unfortunate. This turn of events was brought before Leavenworth Waterworks Board for their deliberation at the regular Board Meeting of 8 June 1987.

Although we would be pleased to supply your water needs, we feel the additional administrative load projected by your ~~reporting system is unrealistic for our limited~~ staff to undertake; in our view lacking in efficiency and wasteful of time. May I therefore suggest your reconsideration of the three options we offered in our letter of 12 May 1986. It is my understanding that your contract requirements would be simplified if you chose the 1 year option, allowing you to act as a "normal" water customer: sign a water service agreement and pay the cost of main extension and meter installation to support the service. Our current estimate approximates \$43,500 to initiate the project.

Further the Leavenworth Waterworks Board offers to apply the cost you sustain for the above (we would try to minimize project cost by allowing the project to bid via our system) as a monthly credit of 1/120th against your bill until totally rebated or until service is terminated.

Please consider this recommendation and notify us at your earliest convenience.

Sincerely yours,

B.K. Kansteiner, Manager
Production and Distribution

BKK/vlt
Enclosure

AC 86-59
WARM/USP

②

10/1/87

June 4, 1987

Patrick E. Smythe, ARA/PA

Leavenworth Waterworks, 601 Delaware, Leavenworth, KS 66048, SD-07-350

Mr. Larry Henshaw
Contracting Supervisor
U.S. Department of Justice
Federal Prison System
U.S. Penitentiary
Leavenworth, Kansas 66048-1254

We are in receipt of your May 29, 1987 letter requesting a determination on whether the Leavenworth Waterworks qualifies a small business.

This office was contacted by Leavenworth Waterworks for the size standard for water supply. The SIC Code 4941, with a size standard of \$3,500,000 average annual receipts for the last three completed years was provided to them. Due to a misunderstanding between the two parties at that time a complete definition was not provided.

Part 121.3(E) (b) of the Small Business Administration defines concern as "...any business entity organized for profit...". As stated in the November 8, 1982 from our Philadelphia Regional Office, "municipal agencies do not meet the basic requirements for a small business." Since Leavenworth Waterworks does not qualify as a small business concern a subcontracting plan will be required if there are any subcontracting opportunities.

Please accept our apologies for any inconvenience this may have caused.

Sincerely,

P. E. Smythe
Patrick E. Smythe
Assistant Regional Administrator
for Procurement Assistance

cc: Mr. B.K. Kansteiner
Leavenworth Waterworks

Mr. Larry L. Moreau
GSA, Washington, D.C.

OFFICE OF CONTRACTS

JUN 12 1987

RECEIVED



February 16, 1982

Mr. Larry L. Moreau, Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, D.C. 20406

FEB 24 1982

Re: Contract for Electrical
Service - Muskogee VA Hospital

Dear Mr. Moreau:

Your letter of September 22, 1981, to Mr. John Harbour in response to his letter to you dated February 18, 1980, has been referred to me.

After reviewing the documents, I must inform you that the requirement of submission of a Subcontracting Plan which you have added is unacceptable. Additionally, the clauses set forth in Mr. Harbour's letter of February 18, 1980, under the topic "2. Form 1685" are still unacceptable.

The basic problem stems from the fact that you view this as a 10-year contract which, because of the aggregate dollar amount, would require provisions which are objectionable.

Oklahoma Gas and Electric Company takes the view that this is a year-to-year contract. Therefore, the need for the government's form is alleviated since the dollar limit is not exceeded.

To my knowledge there are no special circumstances which would give rise to the necessity of a contract for a term longer than one year which is the standard term under our filed tariffs.

A representative of OG&E met with Mr. Kenny Rader per your suggestion. In order to resolve our differences and in an attempt to accommodate the government, Mr. Rader was given the option of a one year contract or continuing service under the present system. Mr. Rader informed OG&E that service was to be continued under the present system.

Please direct your letter to me if you should have any further comments or question.

Very truly yours,

Diane Goldschmidt
Attorney

DG:mch

APPENDIX B

JUL 16 1984

POTOMAC ELECTRIC POWER COMPANY

1800 PENNSYLVANIA AVE., N.W.

WASHINGTON, D.C. 20006

(202) 678-2300

July 13, 1984

ALAN D. KIRK D
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

John L. Stanberry, Ph.D.
Assistant Commissioner
General Services Administration
Office of Public Utilities
Public Buildings Service
Washington, D.C. 20405

Dear Dr. Stanberry:

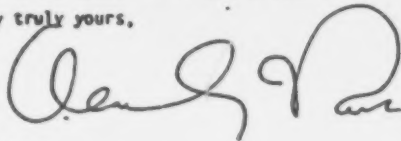
Your June 27th letter to Mr. Mitchell has been forwarded to me for response. In your letter, you requested that PEPCO "prepare a subcontracting plan as soon as possible for [GSA's] review and approval." Notwithstanding the absence of an existing contract with GSA, you have suggested that PEPCO is required to prepare and submit such a plan by Public Law 95-507, under the reasoning of United States v. New Orleans Public Service Company, Inc., 553 F.2d 459 (5th Cir. 1977).

I do not share your interpretation of Public Law 95-507 as mandating GSA approval of a PEPCO formal subcontracting plan based on the existing service relationship.

Please note that applicability of 15 U.S.C. §637(d)(4)(B) requires negotiation of a subcontracting plan only, among other things, if: 1) the procurement was negotiated (See, 4(B)(1)); and 2) the contract is currently being let, modified or amended (See, 4(B)). Since PEPCO continues to serve the government pursuant to tariff, those conditions do not appear to be satisfied.

In reviewing the subcontracting plans which you enclosed, however, we remain convinced that PEPCO's efforts in this area have been extremely effective. While I find no requirement to submit a formal subcontracting plan for GSA review and approval, I have no objection to describing to GSA PEPCO's development program for informational purposes, if that would be helpful to you. Should you wish PEPCO to provide information concerning its program with this understanding, please let me know, and we can make whatever arrangements seem appropriate.

Very truly yours,



cc: Mr. Edward F. Mitchell



San Diego Gas & Electric

September 2, 1983

FILE NO. SLE 510

CC # 50073

Mr. Clifford Whitefield
 Chief, Buildings Services Contracts Branch
 Real Property Contracts Division
 Public Buildings and Real Property
 General Services Administration - Region 9
 525 Market Street
 San Francisco, CA 94105

Subject: The Subcontracting Plan

Dear Mr. Whitefield:

While negotiating a contract (submitted to SDG&E on November 17, 1983) for electrical service to the Veterans Administration (VA) Hospital, General Services Administration (GSA) indicated that San Diego Gas & Electric must also execute a "Subcontracting Plan" (Plan).

SDG&E has reviewed Public Law 95-507. Legal counsel has advised that SDG&E is not required under the law to file a plan. Therefore, the purpose of this letter is to inform you of the Company's decision not to submit a Plan.

In 1978, Congress amended the Small Business Act to enhance the federal subcontracting opportunities for small businesses and small businesses owned by the disadvantaged. The act requires that before any contract may be awarded which exceeds \$500,000 and offers subcontracting possibilities, the apparent offeror shall negotiate with the procurement authority a Subcontracting Plan.

We do not feel that the provision of electric service will require, or result in, the need for subcontracting. To further clarify; in the ordinary course of business, no subcontracting possibilities will directly result from the execution of a contract to provide electrical service to the VA Hospital.

We request that your office prepare a new contract submittal without the Subcontracting Plan as an integral part thereof, and we will proceed with corporate review and approval.

As a point of information, SDG&E does advocate and possess an active Purchasing Policy regarding minority contractors and suppliers. We have pledged to broaden our sources of suppliers of goods and services by increasing the participation of minority and women-owned business enterprises in the procurement of goods and services. In addition, our basic policy advocates the following:

Mr. Clifford Whitefield
Page 2

September 2, 1983
SLE 510

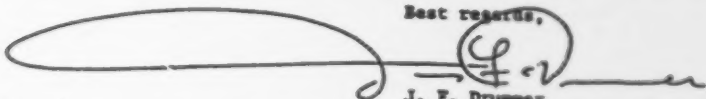
- A. Continued on-going efforts to identify qualified minority and women suppliers and contractors and add them to our approved bidders' list.
- B. Assistance, through education or special consideration, of minority and women-owned businesses to become eligible for SDG&E business.
- C. A continuing effort will be made to increase the dollar volume of purchases from minority and women-owned business enterprises.
- D. On major project contracts, to the extent practicable, establish a requirement of the prime contractor to actively seek minority and women-owned subcontractors and suppliers.
- E. Maintain and monitor records of contracting activity with minority and women-owned business enterprise.
- F. Allocate responsibility to carry-out the foregoing among SDG&E's three purchasing groups; namely, General Supplies, Project Buying and Major Project Buying. Specific action plan for each group will be incorporated into the yearly work plan for each group.
- G. Insure prompt payment for goods and services provided by minority and women-owned business enterprises.

Our position is a matter of record and is currently on file with the State of California Public Utilities Commission.

If you feel it necessary, I would be happy to arrange a meeting between yourself and involved persons from SDG&E to discuss the details of our decision.

Should you have any questions, please call Kirk Romag at 619/699-5446.

Best regards,



J. F. Drummer
Governmental Services Supervisor

JFD:KAR:rb



THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
P.O. BOX 1008 - CLEVELAND, OHIO 44101 - TELEPHONE (216) 522-6800 - ILLUMINATING BLDG - 95 PUBLIC SQUARE

Serving The Best Location in the Nation

September 14, 1981

Mr. A. M. Kalata
Contracting Officer
General Services Administration - Region 5
230 South Dearborn Street
Chicago, Illinois 60604

Re: Contract Between The Illuminating Company and GSA for Service to the Anthony J. Celebrezze Federal Office Building

Dear Mr. Kalata:

We have reviewed your proposed contract. Our Rates, Legal and Energy Application people find it very satisfactory in many respects, but we are unable to sign it in its present form. In this letter, we offer amendments to your proposal which we will designate as our counterproposal, subject to later change as necessary. Many of our proposals reflect operative facts rather than a different philosophy on distribution of business or legal risks.

Following are the changes we propose:

Form 1683

1. Service Location - use 10,000 kW instead of 6,500 kW since there is no additional charge and our minimum charge is stated as 50% of the contracted demand but in no case less than 5,000 kW.
2. Point of Delivery - detailed on addendum #3 rather than #7. Therefore, strike reference to addendum #7.
3. Service Characteristics - the 2% allowable variation should be changed to 5%. We operate within the limits of normal 11,000 volt system conditions established by the American National Standards Institute Regulation C-84.1-1977.
4. Charge - the estimated annual consumption should be changed to 19,960,000 kWh at an estimated cost of \$970,000 to reflect most recent usage and charges.
6. Special Terms and Conditions - reference to GSA Form 1684 should be eliminated and FUCO No. 11 Sheets No. 5, 9, 13, and 16 of our General Rules and Regulations should be substituted.

Mr. A. M. Kalata

- 2 -

September 14, 1981

In addition, we propose on the back of GSA Form 1683 (TERMS AND CONDITIONS) the following changes:

PAYMENT OF SERVICES, delete paragraph (a). For (c), change 30 to 10, and for (d), add at the end "Provided, however, interest charges at the rate provided for by Addendum No. 1 apply to amounts paid hereunder."

Also, we propose deleting entirely the provisions of GSA 1684 (TECHNICAL PROVISIONS). Under Addendum No. 1, we propose to insert a new paragraph 5 to replace the now deleted TECHNICAL PROVISIONS. Paragraph 5 would read, "The provisions of Contractor's General Rules and Regulations, 2nd Revised Sheet No. 5, 3rd Revised Sheet No. 9, 2nd Revised Sheet No. 13; and 2nd Revised Sheet No. 16, as may be later amended, are attached hereto and incorporated by reference, as if restated, except for that language explicitly deleted." This language refers to the Company's General Rules and Regulations which provide for matters otherwise provided for under TECHNICAL PROVISIONS. Also under Addendum No. 1, we propose to make the same dollar changes as on the first page. The tariffs attached will be those of the Large Industrial Schedule in effect at the time of contracting.

7 Our lawyers believe the Illuminating Company will fulfill the requirements of this contract without subcontracting. They do not believe our contracts with suppliers for coal and other raw materials are subcontracts. If GSA agrees that we do not subcontract, our lawyers would prefer language in the contract to that effect and references to a Subcontracting Plan deleted. Our NASA contract recently signed handles it in this manner.

7 Also, our lawyers want provisions regarding Utilization of Women Owned Business Concerns deleted, since they believe they extend beyond the scope of the executive order implementing those requirements.

I ask that you contact me to indicate your position on our proposals. If you would like to meet, I will arrange it. I suggest Cleveland where more representatives of the Illuminating Company are available.

Very truly yours,

William J. Heran / cgl

William J. Heran
Senior Representative
Commercial Energy Application
Department

WJH:lnb

Enclosures

cc: Larry S. Moreau
Director, Public Utilities Service Division
Office of Public Utilities

THE EAST OHIO GAS COMPANY

EAST NINTH AT SUPERIOR

MAILING ADDRESS: P.O. BOX 878
CLEVELAND, OHIO 44101

CLEVELAND, OHIO

May 26, 1982

Robert Riley
General Services Administration
Office of Public Utilities T.U.S.
425 I Street, N.W.
Washington, D.C. 20406

RE: GAS SERVICE FOR VETERANS ADMINISTRATION MEDICAL CENTER,
10000 BRECKSVILLE RD. AND 10701 EAST BLVD., CLEVELAND, OHIO

I am writing to you at the suggestion of Mildred Zarzour, VA Contracting Officer. We have been discussing a contract for gas service at the above locations. In our situation, the contract is being requested to meet your paperwork procedures and not to commit the VA to any particular gas purchase and not to commit East Ohio to serve gas in any but its normal way at its PUCO-approved rates.

Contract discussions are bogged down as regards the proposed Paragraph 22, Subcontracting Plan for Minorities and Small Businesses. It seems to me that the proposed contract is not one which offers subcontracting possibilities within the contemplation of 15 USCA §637(d)(4)(B)(iv) and that the same would generally be true of other routine utility service situations. I have discussed this with Larry Moreau of your office and am expecting his reflections on the matter. -1/5/2

If you agree with me, Paragraph 22 could be changed to read as follows: "The Government has determined that no subcontracting plan is required of Contractor for this contract pursuant to 15 USCA §637 for the reason that the contract does not offer subcontracting possibilities." If this change is acceptable, please advise and I will consider the remainder of the proposed contract.

The facilities to be served are located within our northeast Ohio service area. We are regulated by the Public Utilities Commission of Ohio. The rates available to the VA are the same rates as are available to the remainder of our almost one million customers. We have provided this service for a long time, and in recent years have not had a contract as is herein being requested. I submit that there is no need for a contract in order for this service to continue.

Larry L. Moreau

-2-

1/27/82

such that the dollar threshold of 632(5)(A) is met. While there are, perhaps, certain accounting benefits to be derived by the GSA from an area wide contract, the cost to TEP associated with the implementation and maintenance of the contract cannot be justified by the revenues under the contract.

Should the GSA wish to reconsider either the contract's term or the question of whether there is a solicitation of a bid in this contract, then the feasibility of executing an areawide contract would be enhanced.

If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,



John A. Harper

JAH:jec

Tucson Electric Power Company

220 West Sixth Street
P. O. Box 711
Tucson, Arizona 85702

FEB 1 1982

John A. Harper
Attorney

January 27, 1982

(602) 684-3655

Larry L. Moreau
Director, Public
Utilities Services Division
Office of Public Utilities
GSA
Washington, DC 20406

Re: Proposed Areawide Contract No. GS-00S-67092

Dear Mr. Moreau:

I am in receipt of your letter dated December 24, 1981, and addressed to Mr. Dennis Nelson concerning the status of GSA's proposed areawide utility contract No. GS-00S-67092.

Please be advised that discussions between the government and Tucson Electric Power Company ("TEP") have taken place since your formal status review request of July 16, 1981. Indeed, since that time numerous discussions have occurred between myself and representatives of the GSA from the San Francisco offices. To date, their emphasis has been the pursuit of individual contracts.

TEP is satisfied with the course the parties' negotiations have followed. Our reluctance to enter into an areawide contract, as has been expressed and subsequently reiterated to representatives of your department, has been the imposition of certain federal obligations upon TEP without any corollary benefits flowing from the satisfaction of those obligations. For example, the mandate for a subcontracting plan pursuant to 41 U.S.C. 632(5)(A) et seq is triggered when the contract amount exceeds \$500,000 and there is bid solicitation. Such a plan seems wholly inappropriate where there clearly exists no bid solicitation in reference to electrical service. Moreover, GSA has requested contracts with ten-year terms. The consequence of such a provision is to bootstrap the contract

Larry L. Moreau

-2-

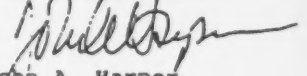
1/27/82

such that the dollar threshold of 632(5)(A) is met. While there are, perhaps, certain accounting benefits to be derived by the GSA from an area wide contract, the cost to TEP associated with the implementation and maintenance of the contract cannot be justified by the revenues under the contract.

Should the GSA wish to reconsider either the contract's term or the question of whether there is a solicitation of a bid in this contract, then the feasibility of executing an areawide contract would be enhanced.

If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,



John A. Harper

JAH:jec

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Washington Suburban
Sanitary Commission

4017 Hamilton Street • Hyattsville, MD 20781 • (301) 699-4000
Department of Engineering • 8103 Sandy Spring Rd. • Laurel, MD 20707

FEB 5 1987

Mr. Larry L. Moreau
Director, Public
Utilities Services Division
Office of Procurement
General Service Administration
Washington, D. C. 20405

Dear Mr. Moreau:

As you know, from prior telephone conversations, we have reservations about executing multiple year contracts for each of our Federal water/sewer customers. Actually, we see little merit to administering even annual contracts for Federal Offices. To go beyond that, to commit ourselves to annual reporting of our small business sub-contracting outlays within our servicing jurisdiction, would amount to an added cost to our total customer population.

This Commission is a state agency and has been declared such by both the Federal and local circuit courts. As a government (State) controlled monopoly, the Commission is given the sole responsibility for furnishing water and treating sewage in the Washington Suburban Sanitary District comprised of Montgomery and Prince George's Counties. Each Federal agency or office location we serve is billed either monthly or quarterly for services already rendered--yet we incur the treatment cost of providing such service to the site prior to their billing. Each of our customers is billed on the basis of metered consumption, with rates approved by public hearing. For comparative purposes it is something akin to telephone billings for which users are billed after use--but it is unlikely that you have multiple year contracts with them.

Even though this agency is regarded as a pioneer in adopting laws for minority contracting, the implications of what your Agency seeks would nevertheless compel us to adopt costly administrative tracking procedures. Whether or not it was the intent of Congress to apply the essence of the Small Business Investment Act of 1958 (PL 95-507) on a sovereign-to-sovereign basis is unclear. Our reading of Public Law 95-507 suggests that the law does not have the latitude for multiple year contracting; the cited law further appears to be silent on public utility participation for recurring type services.

Sincerely,

Stephen B. Profilat
Stephen B. Profilat
Contracting Officer

ENCLOSURE D

INDEX

1. Arkansas Power & Light Company
Little Rock, Arkansas 72203
2. Baltimore Gas and Electric
Baltimore, Maryland 21203
3. Consolidated Edison Company of New York, Inc.
New York, New York 10003
4. Consumers Power Company
Jackson, Michigan 49201
5. Florida Power & Light Company
Miami, Florida 33152
6. Florida Power Corporation
St. Petersburg, Florida 33733
7. Hawaiian Electric Company, Inc.
Honolulu, Hawaii 96840-0001
8. Johnson City Power Board
Johnson City, Tennessee 37701
9. Kentucky-American Water Company
Lexington, Kentucky 40522
10. Long Island Lighting Company
Patchogue, New York 11772
11. Louisville Gas and Electric Company
Louisville, Kentucky 40232
12. National Fuel Gas Distribution Corporation
Buffalo, New York 14203
13. New Orleans Public Service, Inc.
New Orleans, Louisiana 70180
14. Public Service Company of North Carolina
Gastonia, North Carolina 28052



ARKANSAS POWER & LIGHT COMPANY
FIRST COMMERCIAL BUILDING/P. O. BOX 551 LITTLE ROCK, ARKANSAS 72203/(501) 371-4288

LOUIS N. BURGESS
Vice President
Customer Services

December 10, 1986



Ms. Judy Parnell
GSA: OPR 7PPB-P
Room 12A01
819 Taylor Street
Fort Worth, Texas 76102

Re: GSA Vault Project - Little Rock, Arkansas

Dear Ms. Parnell:

This will confirm discussions between you and Cynthia Robertson in our Little Rock Division regarding contractual arrangements for a vault to serve the Federal Building and Post Office in Little Rock.

For many years we have entered into service contracts only on our own contract forms, which are in accordance with the policies approved by the Arkansas Public Service Commission. Because of the great difficulty in administering a wide variety of contracts, we are unwilling to enter into agreements other than on these forms.

We are required to serve your installations on the most favorable rate schedule and will do so even in the absence of a formal agreement.

Sincerely,

Louis Burgess
Louis Burgess

LB/an

_cc - Mr. Fred Clark



MAY 3 1982

CHARLES CENTER - P.O. BOX 1475 - BALTIMORE, MARYLAND 21203

SCHULZ
JAS

April 28, 1982

Mr. Larry L. Moreau
 Director, Public Utilities Services Div.
 General Services Administration
 Transportation and Public Utilities Service
 Washington, D.C. 20406

Dear Mr. Moreau:

Your recent letter to Mr. Bryant regarding the GSA proposed areawide contract has been referred to me for response. The letter suggests that a meeting be held to discuss the BG&E concerns with regard to the proposed contract. I must decline your offer on behalf of our Company. We see no useful purpose for having such a meeting.

It is our view that the BG&E concerns cannot be resolved by your office. As I indicated to Mr. Chhabra in our telephone conversation, BG&E is unwilling to agree to paragraph 7 of the so-called "equal opportunity clause". This paragraph could require BG&E to cease doing business with or take other action against a vendor who has fulfilled all of its obligations to us and whose product may be crucial to our operation. In our opinion, the Federal Regulations, 41 CFR §60-1.4(a) make it mandatory for GSA to include the entire seven paragraphs of the clause in each of your contracts. Your own letter references this problem with the phrase, "In order for us to address your concerns within the authority of our office" (Emphasis added). In our opinion, this is a problem that cannot be resolved without a change in the regulations.

Respectfully yours,

Joseph A. Schulz

JAS:jd

cc: Messrs. R. C. Bryant
 J. A. Biddison, Jr.

Consolidated Edison Company of New York, Inc.
4 Irving Place, New York, NY 10003
Telephone (212) 460-2744

June 26, 1986

Mr. Larry L. Moreau
Director, Public
Utilities Services Division
General Services Administration
Washington, D.C. 20405

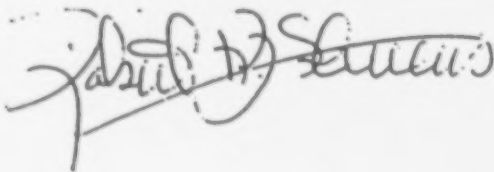
Re: GSA Areawide Utilities Contract

Dear Mr. Moreau:

Con Edison's Chairman, Arthur Hauspurg, has asked me to respond to your June 13, 1986 letter to him. Your letter states that GSA "has been negotiating a proposed renewal areawide contract with Mr. Robert Stevens, Vice President of Customer Services. To date, we have not received a positive response." I explained to Mr. Hauspurg that your letter was not entirely correct, as: (a) we have not been negotiating a new agreement; and, (b) we have informed GSA on more than one occasion that we do not propose to enter into your form of agreement.

If it would ease the administrative problems of the federal users in our area, we would be willing to consider a very simple form of agreement. Bernard Hulkower, an Assistant General Counsel at Con Edison, has made a number of efforts to talk with you about this matter. He informs me that you have not returned his calls. You might wish to call him at 212-460-4875 if you are interested in entering into a simple form of agreement.

Very truly yours,



ms



Consumers
Power
Company

C F Brown
Vice President
Customer Services

General Offices: 212 West Michigan Avenue, Jackson, MI 48201 • (817) 788-0653

August 29, 1985

SEP - 6 1985

General Services Administration
Att: Mr Larry L Moreau, Director
Public Utilities Services Division
Office of Public Utilities
Washington, DC 20406

This letter is in response to your letter dated June 28, 1985, to Mr Gerald D Wyse, Marketing Services Engineer, Saginaw, which requested a reply from a corporate officer regarding the proposed contracts between Consumers Power Company and the General Services Administration.

Your attention is directed to Mr Steven H Howell's letter of April 19, 1982 (copy attached) to you on the same subject. We affirm the position contained in his letter. It contained the statement, "We plan to abide by the law and by all applicable regulations. However, we are not willing to enter into a contract which requires so many additional burdens over and above the law. To do so would result in additional cost and risks to our customers and stockholders."

Nothing has changed during the past two years to alter our position. We understand that the government position is still that none of their proposed requirements can be eliminated. If that is not so, we would be willing to negotiate reasonable terms. However, if it is so, we will require that service to Federal government customers be under our non-contract rates or under our standard contract for electric and gas service customers.

Yours very truly,

MAY 4 1983



**Florida
Power**
CORPORATION

April 28, 1983

John L. Stanberry, PhD
Assistant Commissioner
General Services Administration
18th & F Streets, N.W.
Washington, D. C. 20405

Dear Dr. Stanberry:

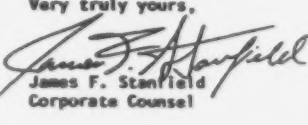
This communication is in response to your letter of April 21, 1983 to Mr. Andrew Hines.

Florida Power Corporation has evaluated the request of the General Services Administration for an Area-wide Utility Contract and we have concluded on each occasion that it is not in the best interests of Florida Power and its customers. We acknowledge that some other utilities have chosen to enter into such a contract. We also know that others have not chosen to enter into such a contract for their own reasons.

We further acknowledge that the General Services Administration desires a particular contract form and have repeatedly informed GSA that we do not desire the same form.

While we do not believe a meeting would be beneficial, Mr. Maurice Hebb, Vice President and Assistant to the President, and I will meet with you or your staff should you still so desire. Please have your staff contact me at (813) 866-5786 if you would still like to meet.

Very truly yours,


James F. Stanfield
Corporate Counsel

JFS:BR

cc: Mr. Maurice Hebb



May 24, 1984

John L. Stanberry, Ph.D.
Assistant Commissioner
Office of Public Utilities
Public Buildings Service
General Services Administration
Washington, D.C. 20405

Dear Dr. Stanberry:

The purpose of this letter is to acknowledge receipt of your April, 1984 letter to Mr. J. J. Hudiburg, our President, and to communicate to you our position concerning the overall GSA contract proposal.

As you recall, during the negotiations between us, I expressed concern at our meetings that the contract could impose additional administrative expense on our Company and ultimately our ratepayers. For example, it envisions a more centralized interface. The servicing of electric service accounts within our Company, however, is essentially decentralized throughout our five geographic divisions. The personnel in our district offices are knowledgeable and practiced in the handling of electric service under the Florida Administrative Code, Rate Schedules, and our General Rules and Regulations as approved by the Florida Public Service Commission. Thus, our operations do not lend themselves well to a more centralized concept.

Despite the concerns raised early in our discussion, we have continued negotiations with you in the hope that the issues could be resolved and a cost effective document agreed upon. It is our position that this has not been accomplished; therefore, Florida Power & Light Company sees no business reason to enter into the proposed contract.

We remain concerned with your statements made at our August 26, 1982, meeting in Miami and at our October 21, 1983, meeting in Washington. As you recall, you advised Florida Power & Light Company representatives at these meetings that, if we failed to execute the agreement, there might be media coverage of that failure, which you alleged would be due to the so-called "social covenants." This is particularly disturbing because we are committed to the programs covered by these covenants, as evidenced by the attached policy statement concerning minority contracting and purchasing.

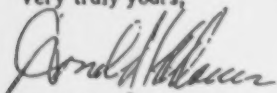
John L. Stanberry, Ph.D.

Page 2

May 24, 1984

As you know, both GSA and FPL personnel have invested considerable time and expense in the hope of reaching a cost effective agreement. We appreciate the courtesies extended to us. Please let me know if you would like to discuss any aspect of this matter further.

Very truly yours,



Donald E. Adams
Commercial, Industrial, Agricultural Manager

DEA:hdn
Attachment

FLORIDA POWER & LIGHT COMPANY
POLICY FOR EXPANDED UTILIZATION
OF
SOCIOALLY AND ECONOMICALLY DISADVANTAGED
SMALL BUSINESS CONCERNS

Florida Power & Light Company (FPL) is an Equal Opportunity/Affirmative Action Employer. Additionally, it is the policy of FPL to actively seek out and encourage qualified socially and economically disadvantaged small business concerns to participate in FPL procurement activities on a competitive bid basis.

For purposes of this policy, the term "socially and economically disadvantaged small business concern" means a small business as defined in Section 3 of the Small Business Act and Regulations issued under that section:

1. which is at least 51% owned by one or more socially and economically disadvantaged individuals; and
2. whose management and daily business operations are controlled by one or more such individuals.

As used in this policy, the phrase "socially and economically disadvantaged individuals" includes the following (unless otherwise determined by appropriate authorities): Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, women's business enterprises, and other recognized minorities as well as any other individual found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act.

FPL will assist all business enterprises including socially and economically disadvantaged concerns in understanding the bidding/procurement processes of FPL and in pre-qualifying preparatory to performance of work/services or supplying materials/equipment.

FPL is committed to increasing the number of bid opportunities available to socially and economically disadvantaged vendors and contractors. We will ensure that qualified socially and economically disadvantaged small business concerns are considered whenever practicable in the purchase of goods or services required by the Company consistent with our obligation to provide a quality product on a timely basis at reasonable cost to our customers.



J. J. Hudiburg
President and
Chief Executive Officer

Issued 7/76
Revised 5/84

Hawaiian Electric Company, Inc. • PO Box 2750 • Honolulu, HI 96840-0001



George T. Iwahiro
Vice President
Consumer Regulatory
& Public Affairs

December 21, 1987

Ms. Peggy J. Siddall
Contracting Officer
General Services Administration
Buildings Services Contracts Branch
525 Market Street
San Francisco, California 94105

Dear Ms. Siddall:

Re: Contract No. GS09P87KSC0921

Since the services we provide, and the fees we may charge, are strictly regulated by the local Public Utilities Commission, Hawaiian Electric Company, Inc., has decided it will no longer execute written contracts for the providing of utility services to federal government agencies. Such services will be provided in the future -- as they are to most of our customers -- without a formal written agreement.

This action is being taken pursuant to 48 C.F.R. 8.304-5(g), which allows a utility service supplier to provide utility services without a written contract. (See also 48 C.F.R. 8.304-5(c).)

We note that 8.304-5(g) also requires one of our corporate officers to send a "definite and final refusal" to execute a written contract. This letter constitutes that refusal.

Of course, Hawaiian Electric Company, Inc., will continue to proudly serve federal government agencies pursuant to the applicable PUC tariff. The absence of a written contract will in no way affect the quality of service we will provide.

Please contact me if you have any questions or concerns on this matter.

Very truly yours,

George T. Iwahiro

12/29/87

BOX 1836
100 NORTH ROAN STREET
JOHNSON CITY, TENNESSEE 37601
August 31, 1987

Mr. Jimmy Smiley
Veterans Administration
Mountain Home, Tn 37684

Dear Mr. Smiley,

I am returning the proposed utility contract which you recently sent to my attention.

We have our standard contract with the Veterans Administration now which has an automatic renewal clause and ~~I see no reason to sign a new contract.~~

Very truly yours,

JOHNSON CITY POWER BOARD

Roy L. Taylor

Roy L. Taylor
Manager

RLT:h

Enclosures

CONTRACT FOR LIGHTING AND POWER SERVICE

THIS CONTRACT, made this the 14th day of October, 1986, by and between
Veterans Administration Mountain Home, Tennessee
 (Name) (Address)
 hereinafter called the "Customer," and Johnson City Power Board
 with office at 100 N. Roan Street, Johnson City, Tennessee hereinafter called the "Distributor."

WITNESSETH:

Whereas, the Customer has applied to the Distributor for electricity for the operation of
Veterans Facility at Mountain Home, Tennessee

NOW, THEREFORE, in consideration of the premises and the mutual agreements hereinafter set forth, the parties hereto agree as follows:

1. The Distributor will supply, and the Customer will take and pay for, all the electricity required for the operation above described in accordance with the terms hereof and the Rules and Regulations of the Distributor, a copy of which is attached hereto and hereby made a part hereof. This contract allows a maximum demand not exceeding 4995 KW. The Customer shall not take electricity in excess of such maximum demand except by agreement of Distributor and revision of contract, but nothing herein contained shall be construed to relieve the Customer of the obligation to pay for such amounts of electricity as may actually be taken.

2. Attached hereto is Distributor's General Lighting and Power Rate, Schedule GP-7 which is Distributor's currently effective standard rate schedule applicable to consumers of the same class as Customer. The power and energy made available hereunder shall be purchased and paid for by customer in accordance with the rates, changes, and provisions of said standard rate schedule as modified from time to time by agreement between Distributor and the Tennessee Valley Authority, except as specifically provided in this contract.

3. The Customer shall pay as a minimum the amounts determined under the provision of the attached rate Schedule entitled "Minimum Bill" but in no case shall the minimum monthly bill referred to in said rate schedule be less than \$4,995.00 (\$ 4,995.00).

4. The electricity furnished hereunder shall be in the form of three phase, alternating current, at approximately 60 cycles and 12.47/4.16 K volts.

5. The Point of Delivery for the electricity supplied hereunder shall be owners premises

and maintenance by the Distributor of approximately the above-stated voltage and frequency at said point of Delivery shall constitute delivery of electricity for the purpose of this contract. The electricity to be supplied the Customer hereunder shall be metered at the step-down transformer bank or banks of a substation to be constructed, owned, and operated by the Distributor, and the Distributor will install only such protective devices as in its opinion are necessary for the protection of its transformer bank or banks, and/or the transmission line or transmission lines supplying power to such substation. The Customer shall furnish the Distributor gratis with a suitable substation site and a right of way thereto over the property of the Customer for the period thereof, the transformer banks, transmission facilities and other equipment installed thereon to be considered the personal property of the Distributor. The Distributor's agents and employees shall have the right of ingress and egress on said site and right of way.

6. The term of this contract shall be one (1) years. This contract shall begin on the date the delivery of electricity hereunder is actually begun, which it is estimated will be approximately October 14, 1986

and shall be considered renewed for a year from the expiration of said term, and from year to year thereafter, unless written notice to the contrary is given by either party to the other at least three (3) months prior to the expiration of the term of the contract or any then existing renewal thereof.

7. This contract shall inure to the benefit of and be binding upon the respective heirs, legal representatives, successors, and assigns of the parties hereto, but is not assignable by the Customer without written consent of the Distributor.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be duly executed in _____

_____ the day and year first above written.

V.A. Medical Center

(Customer)

Johnson City Power Board

(Distributor)

By Jan Anderson, Contracting Officer
 (Official Capacity)

Ray L. Taylor, mgr.
 (Official Capacity)

2500 Richmond Road
P.O. Box 7500
Lexington, Kentucky 40522
606-269-2386, Ext. 261

COLEMAN D. BUSH
Business Manager



March 18, 1987

Veterans Administration
Medical Center
Leestown Road
Lexington, Kentucky 40511

Attention: Peggy Martin

Re: Contract GS-00P-87-BSD

Dear Ms. Martin:

As we discussed, we see no reason to enter into this contract. We operate under guidelines and regulations approved by the Public Service Commission of Kentucky. We do not offer separate contracts to any other customers.

Very truly yours,

Coleman Bush
Coleman Bush
Business Manager

CB:kb



LONG ISLAND LIGHTING COMPANY

460 EAST MAIN STREET • PATCHOGUE, NEW YORK 11772

TEL. 478-3000

November 20, 1985

Mr. Robert Leuffen
General Services Administration
26 Federal Plaza
Room 2341
New York, N.Y. 10278

Dear Mr. Leuffen:

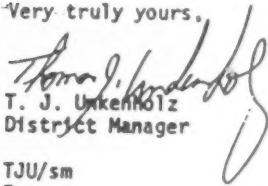
Here is the signed contract for the service in Holtsville. Thank you very much for your assistance and I apologize for the delay in returning it to you.

Our Legal Department has advised me that we cannot agree to the provisions of GSA Form 1685-A from paragraphs 21 on until they have had an opportunity to research these provisions. In order to prevent further delay in this contract, we are returning an executed copy with the pages beginning at paragraph 21 of Form 1685-A deleted.

I would appreciate it if you would notify Finance that they can release the checks.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,



T. J. Unkenholz
District Manager

TJU/sm
Enc.

FEB 6 1984

LOUISVILLE GAS AND ELECTRIC COMPANY
INCORPORATED IN KENTUCKY

P. O. BOX 32010

LOUISVILLE, KY. 40232

PHONE 502 566-4220

OFFICE OF THE
PRESIDENT

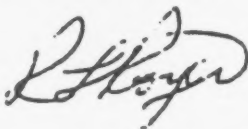
February 3, 1984

Mr. Larry L. Moreau
Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, DC 20405

Dear Mr. Moreau:

Thank you for your letter of January 27 concerning an area-wide contract. If we should become interested at a later date in renewing discussions on this subject, as suggested in your letter, Mr. Fred Wright, our Vice President in charge of Planning and Market Services, will get in touch with you.

Very truly yours,



R.L. Royer:rs

cc: Fred Wright

OCT 28 1985

**NATIONAL FUEL GAS DISTRIBUTION CORPORATION**10 LAFAYETTE SQUARE
BUFFALO, NEW YORK 14203Legal Department
Robert J. Kreppel
Attorney

October 25, 1985

(718) 855-7170

Mr. Harbans Chhabra
General Services Administration
Public Building Service
Washington, DC 20405

RE: Areawide Public Utility Contract

Dear Harbans:

In accordance with our most recent conversation, I stated that I would take the issue of an area wide utility contract to the management of National Fuel for their final consideration. Unfortunately, I regret to inform you that, at this time, National Fuel is unwilling to execute the agreement that you have provided to us. National Fuel, will of course, continue to provide gas service to the various federal facilities within our service territory pursuant to the terms of our tariff filed with, and approved by, the Public Service Commission of the State of New York. The tariff is the contract between National Fuel and the GSA for gas service provided to the various federal agencies.

I would be remiss if I did not state for the record our agreement with you with respect to many of the issues in the contract. National Fuel does not discriminate in any way against any minority, handicapped, or economically disadvantaged people. National Fuel has instituted an affirmative action program to assure proper hiring and promoting practices are followed. Also, with respect to our contracting efforts, we do not discriminate in any way with respect to any minority-held businesses, businesses held by women, businesses held by economically-disadvantaged individuals, or businesses held by handicapped individuals. Finally, with respect to your concern that the government be supplied gas at the cheapest rate available given its service characteristics, I will assure you that our marketing group is dedicated to working with our customers. Our marketing representatives continually work with all of our customers to assure that the best rate available, within regulatory constraints, to each customer is provided.

Mr. Harbans Chhabra
October 25, 1985
Page 2

I thank you for your time and effort in this matter and regret that these negotiations cannot come to a mutually agreeable resolution.

Very truly yours,


Robert J. Kreppel

RJK:jec

*Encl
Please respond
by Oct
10-7*
QBT : AGS
National Fuel

October 5, 1983

Mr. Harbans Chhabra
General Services Administration
Public Buildings Service
Washington, D.C. 20405

Dear Mr. Chhabra:

It was a pleasure talking with you on the phone last Friday. I hope we can work out this area-wide public utility contract with minimal difficulty.

Could you please send me a copy of the pertinent portions of the Federal Procurement Regulations relating to the area-wide utility contract. Please include the sections related to the mandatory clauses required by federal law and regulation. Thank you for your help on this matter.

Very truly yours,

Robert J. Kreppel
Robert J. Kreppel
Legal Department

RJK:ljb



NEW ORLEANS PUBLIC SERVICE INC.

POST OFFICE BOX 60340

NEW ORLEANS, LOUISIANA 70190

April 24, 1986



Ms. Kathryn M. Watson
 Procuring Contract Office
 General Services Administration
 Building Services Contract Branch
 819 Taylor Street - Room 12A01
 Fort Worth, Texas 76102

Dear Ms. Watson:

Ms. Enid Frei of your office has requested that we write to you concerning the proposed contract for gas service to the Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana, which your agency submitted to us.

Please be advised that it is not the policy of New Orleans Public Service Inc. to execute contracts with our customers for the sale of utility services other than our own Service Agreement. Accordingly, we must decline to sign the proposed contract which you have sent to us.

Sincerely,

B. J. Seither
 Consumer Services Engineer

BJS/vc

KEY SENIOR VICE PRESIDENT -
GAS SUPPLY AND TRANSPORTATION



Public Service Company of North Carolina, Inc.

COPY

August 6, 1987

Mr. Larry L. Moreau
Director, Public Utilities
Services Division
Office of Procurement
General Services Administration
Public Building Service
Washington, D. C. 20405

Re: Areawide contract between the General Services
Administration and Public Service Co. of N. C., Inc

Dear Mr. Moreau:

Over the course of the last several months, I have had several discussions with Mr. Davar of your staff and I believe there are some misunderstandings between us. I felt that the best way to clear this up would be by spelling out our policies with respect to the sale of natural gas by our Company.

Public Service Co. sells gas under the terms and conditions of its tariff as approved by the North Carolina Utilities Commission (NCUC). We are enclosing a copy of our complete tariff which includes the Company's currently approved Rules and Regulations along with copies of currently effective rate schedules. The rate schedules and the Rules and Regulations are subject to change from time to time with the approval of the NCUC. We are also enclosing a copy of the currently effective Rules and Regulations of the NCUC as they apply to Natural Gas. We believe that these two documents cover the necessary terms and conditions under which gas should be sold or transported and would prefer to operate under these standard conditions rather than individual contracts.

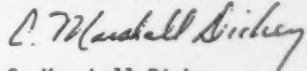
We have been operating under the verbal service agreement as spelled out in the Company's Rules and Regulations for the last several years with satisfactory results. To the best of my knowledge the Company has not executed any contracts with any large commercial and industrial customers covering the sale of gas since the late 1970s.

We believe that we can continue to serve your facilities in a manner which will be satisfactory to you and fair to the Company and its customers under these procedures. If you will provide a list of names and addresses we will be happy to send copies of newly effective or amended rate schedules to the ordering agencies and copies of all notices of applications for rate changes to the General Services Administration.

Mr. Larry L. Moreau
August 6, 1987
Page two

We certainly appreciate your business and look forward to continuing to serve your facilities for many years to come.

Very truly yours,

A handwritten signature in cursive script, reading "C. Marshall Dickey".

C. Marshall Dickey

cc:Mr. Charles E. Zeigler, Sr.
Mr. F. Kent Burns



U.S. Department of Justice
Office of Legal Counsel

ENCLOSURE E

RECEIVED

George

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

OFFICE OF LEGAL COUNSEL

GSA MAR 27 1987

MEMORANDUM FOR CLYDE C. PEARCE, JR.
General Counsel
General Services Administration

You have requested our opinion on whether a public utility, which sells service under tariff to the Federal Government, but which refuses to enter into a formal contract with the Government covering that service, is nonetheless legally required to satisfy the subcontracting plan requirement of Section 211 of Public Law 95-507, codified at 15 U.S.C. 637(d)(4),(5). For the reasons set forth below, we conclude that such utilities are indeed so required.¹

15 U.S.C. 637(d)(2) provides that the following clause "shall be included in all contracts let by any federal agency . . ."

(A) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any federal agency. . . .

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause. 15 U.S.C. 637(d)(3)(A),(B).

¹ Your letter also makes passing reference to a variety of other contracting requirements dealing with clean air and water standards, hiring of the handicapped, etc. Because our opinion largely turns on the language and legislative history of the Small Business Act, it is limited to that Act. We express no opinion on whether utilities are bound by other, different requirements.

Sections 637(d)(4) and (5) require contractors who are selected pursuant to either the "negotiated" or "formal advertising" methods, respectively, and whose contracts "offer[] subcontracting possibilities" to prepare "subcontracting plan[s]."² Section 637(d)(6) specifies the elements to be contained in such plans. They include "percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals."

Pursuant to 40 U.S.C. 481(a)(3), and 48 C.F.R. 1-8.301,4-5, GSA is charged with procuring utility service contracts. On its face, 15 U.S.C. 637(d) would seem to apply³ to these utility contracts, as it does all other contracts. Nevertheless, you indicate that several utilities believe that they fall outside the scope of section 637(d), relying on the following arguments: (1) pursuant to section 637(d)(4)(B), the subcontracting plan requirements attach only to contracts which have been formally negotiated, and they have refused to negotiate; and (2) they have no contract at all with the federal government, within the meaning of section 637(d), but provide services pursuant to state tariffs which require them to provide service to all customers.

Neither of these contentions withstands scrutiny. The first, we think, is simply mistaken. Section 637(d)(4)(B) provides that subcontracting plan requirements apply to contracts which are "to be awarded, or [were] let pursuant to the negotiated method of procurement" (emphasis added). In our view, the plain sense of that language is to specify the type of procurement covered (i.e., the "negotiated method") in order to distinguish it from the "formally advertised" method of procurement, which is covered by section 637(E)(5). It does not announce a

² Gordon Creed, of your office, informs us that all government contracts, by definition, fall into either the "negotiated method" or "formally advertised" category.

³ You indicate that the vast majority of government utility contracts meet the requisite dollar minimum of \$500,000. We note the further requirement that, in order to be covered, a contract must "offer[] subcontracting possibilities." Section 637(d)(4)(B)(iv); 637(d)(j)(A)(iv). While we, of course, defer to your expertise on the question of whether utility contracts offer such "subcontracting possibilities," our opinion is necessarily conditioned upon such a determination. Moreover, to the extent that "socially and economically disadvantaged" is defined in a race-conscious manner by statute (15 U.S.C. 637(3)(C)), it must be applied consistently with the requirements of equal protection. Specifically, any such preferential treatment must be premised upon a convincing showing of prior discrimination by the governmental unit involved and be "narrowly tailored" to remedy such discrimination. See generally, Wygant v. Jackson Bd. of Education, ___ U.S. ___, 106 S.Ct. 1842 (1986).

requirement that "negotiated method" contracts must actually be negotiated in order to fall within section 637(d). In fact, the net effect of subsections (E)(4) and (E)(5) is to require subcontracting plans for all government contracts that meet the requisite dollar amount and that "offer[] subcontracting possibilities." Consequently, the extent to which a utility actually has negotiated -- or refused to negotiate -- specific contract terms is irrelevant. If the utility holds a government contract, within the meaning of section 637(d), it is bound by the provisions of that section.

The essential question, therefore, is whether utilities are indeed contractors within the meaning of section 637(d). The utilities advance two interrelated arguments as to why they are not. They contend that they have no contract with the government at all because (a) the only applicable contract is their state tariff, and (b) state law compels them to serve all customers, including the federal government, and this compulsion vitiates any consent on their part to the federal contract provisions.

We begin our analysis by noting that the legislative history of Public Law 95-507 indicates that Congress intended these provisions to apply to all government contracts, including those not competitively negotiated. The House Conference Report on the bill stated that

It is the intent of the conferees that these subcontracting requirements are not to be construed as being limited to competitively negotiated procurements. Each year executive agencies award large amounts of noncompetitive negotiated (sole source) contracts which provide opportunities for subcontracting. Federal agencies should make provisions to insure that, prior to the award of such contracts, contractors be required to submit contracting plans.

H.R. Rep. No. 95-1714, 95th Cong., 2d Sess. 26, reprinted in (1978) U.S. Code Cong. & Adm. News 3879, 3887.

Moreover, in a similar context, both of the utilities' arguments were rejected by the Fifth Circuit in United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977),

⁴ Indeed, 15 U.S.C. 637, which Public Law 95-507 amended, specifically mentions sole source utility procurements in subsection (g)(1)(E), where it exempts them from certain unrelated notice requirements. Thus, Congress was not unaware of the peculiarities of that type of procurement when it passed Public Law 95-507. And while Public Law 95-507 did prescribe one express exception to its subcontracting plan requirement, contractors who are themselves small businesses (see section 637 (d)(7)), it did not expressly exempt utilities.

vacated on other grounds and remanded, 436 U.S. 942 (1978).⁵ In that case, the utility argued that it was not bound by the affirmative action requirements of Executive Order 11246 and its implementing regulations since "it [was] not furnishing energy to the government pursuant to any contract, but . . . pursuant to its franchises, granted by the City, which require [it] to provide power to all who request it." 553 F.2d at 464. The utility further argued that it had not agreed to the affirmative action provisions required by the Executive Order of all government contractors. Indeed, it had specifically refused to agree to them. *Id.*

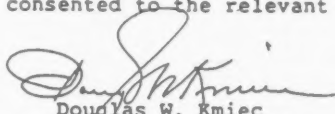
The court rejected both arguments. The court found, from the parties' course of dealing, that the utility did indeed have a contract with the government. The court noted that the mere fact "[t]hat the company services customers under local franchises does not negate the obvious fact that [it] renders such services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing." 553 F.2d at 469. The court further remarked upon the unique features of government contracting, stating that "where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly agreed to by the parties." 553 F.2d at 469.⁶

⁵ A threshold issue in the case was the legality of an administrative search. The Court vacated the Fifth Circuit's opinion on that basis and remanded for reconsideration in light of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). On remand, the Fifth Circuit remanded to the District Court, 577 F.2d 1030, which largely adhered to the principles set forth in the Fifth Circuit's earlier, vacated opinion. 480 F.Supp. 705. On appeal from that decision, the Fifth Circuit reaffirmed its earlier views on federal contract law, but again remanded on the Fourth Amendment question. 638 F.2d 899, 906. The district court again adhered to its judgment, 510 F.Supp. 911, and the Fifth Circuit reversed. 723 F.2d 422.

⁶ The court cited M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1304 (D.C. Cir. 1971) (clause that contract terminable "for the convenience of the government" implied in all government contracts, because required by regulation); G.L. Christian & Assoc. v. United States, 312 F.2d 418, 424 (Ct.Cl. 1963) (where there is "a legal requirement that the . . . contract contain the standard termination clause . . . the contract must be read as if it did.") The court also made a similar point in its opinion following remand. See 638 F.2d at 906.

Under this analysis, we believe utilities are contractors within the meaning of section 637(d). It is true that the non-consensual inclusion of federal contract terms seems particularly troubling in situations where state law mandates the transaction. It may appear that utilities are being unfairly whipsawed by state and federal law -- they are required by state law to service all customers, including the federal government; because they service the federal government, they are required by the terms of their federal contract to implement a small business subcontracting program. Nevertheless, this predicament results largely from requirements which attach to the utilities' legally-protected monopoly status. By engaging in a business which is a legally-established and regulated monopoly, utilities must be deemed to accept both the benefits and burdens attendant upon that status.

In sum, the obligations of Public Law 95-507 are implied by law in those government utility contracts which are above the requisite amount, and which afford opportunities for subcontracting, whether or not they are expressly included in a written agreement. This is so regardless of the utilities' status as legally-established and regulated monopolies, and regardless of whether they have specifically consented to the relevant contract provisions.



Douglas W. Kmiec
Deputy Assistant Attorney General
Office of Legal Counsel

⁷ To the extent that state law specifies that a utility's service agreement with a customer is not a contract, but merely a by-product of the utility's state tariff, that requirement must yield under the Supremacy Clause to Federal law requiring all such purchases to be made pursuant to contract.

⁸ We express no opinion on whether any particular state law actually requires the delivery of service to a customer who places additional conditions on the receipt of that service. If state law does not require the acceptance of such additional conditions, the utility may be excused from the provision of service; of course, if service is still provided, even absent the compulsion of state law, then we believe the additional conditions related to affirmative action would be applicable to the utility. See note 6 and accompanying text.

⁹ Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973); see also, New Orleans Public Service, 553 F.2d at 469-470. (Indeed, even as the utilities here claim that they are victimized by their monopoly status, they use their monopoly power to do business with the government without a formal contract.)



General
Services
Administration

Office of
General
Counsel

Washington, DC 20405

ENCLOSURE F

Date :
Reply to :
Attn of : Assistant General Counsel (LT)

Subject: Southwest Gas Corporation

To : Assistant Commissioner (TU)

In response to your request, we have reviewed the letter dated October 8, 1981, from Mr. Charles H. McCrea, Executive Vice President and General Counsel, Southwest Gas Corporation, in which Mr. McCrea related the company's opposition to preparing and submitting a subcontracting plan, as required by Public Law 95-507. We offer the following comments on the company's contentions.

In his letter, Mr. McCrea mentions the fact that the various public utility commissions which set the company's rates generally prohibit rate discrimination among customers. The company cited this as the principal roadblock to its fulfilling the subcontracting plan requirement. For a number of reasons, we believe this is not a valid impediment to the preparation of the required subcontracting plan.

First, the purpose of Congress in enacting Public Law 95-507 was to alleviate discrimination respecting small businesses and small disadvantaged businesses within the larger business community. Benefits of this national policy flow to all citizens. Under the Supremacy Clause, U. S. CONST., art. VI, cl. 2, if this enactment conflicts with state law or public utility commission policy, the Federal law prevails. There is no reason to believe a state public utility commission would balk at applying this law to a regulated utility.

As to the issue of rate discrimination, Mr. McCrea expressed the concern that a state public utility commission, in establishing rates based on a fair allocation of costs to various customer classes, would view the costs incurred in carrying out this law to be attributable to "only those customers of Southwest which are served under the GSA Contract". We disagree. Costs attributable to implementing and administering Public Law 95-507, we believe, must be considered and treated the same as the company's present legal and administrative costs incurred in implementing other Federal and state statutes, such as the Pipeline Safety Act, and Equal Opportunity Programs. Costs incurred by the company in obeying Federal and state statutory requirements of this sort are a general cost of doing business. As such, traditional cost allocation principles, universally recognized by state public utility commissions, dictate that all customers share responsibility for these costs.

In summary, there is no reason to believe a state commission would allocate the cost of implementing Public Law 95-507 only to Federal customers of Southwest Gas Corporation. Conversely, for the company to suggest that only its Federal customers should pay the costs of implementing Public Law 95-507 would be a clear instance of discriminatory rate making.

Albert A. Vicchiolla
ALBERT A. VICCHIOLLA

Assistant General Counsel
Transportation and Public Utilities Division

10/11/87
K
OCT 30 1987

Dear Mr. Brockman:

344
10-30-87
Lindsay (IC)

We are writing to inform you that on November 28, 1986, our Office forwarded for review and signature a proposed renewal areawide contract for electric and gas services provided by the Public Service Electric and Gas Company (PSE&G) to the Federal agencies in the company's service areas. The renewal areawide contract was requested because our present contract GS-00S-67006, which expired August 15, 1987, has worked very satisfactorily from our point of view.

However, as of this date, we have not received a positive response from PSE&G, such as a signed contract. Though PSE&G is delaying the renewed areawide contract, for lack of an approved small and small disadvantaged business plan, the renewal contract is nevertheless required for operational purposes of both PSE&G and the Government agencies, such as payment of bills and efficiency in obtaining the current and additional utility services.

Please be advised that the Federal Acquisition Regulations (FAR) at subsection 8.304-5(e)(3) require the Federal agencies to acquire utility services by a bilateral written contract, whether or not rates and conditions of services are fixed or adjusted by a Federal, State, or public regulatory body, if the annual cost of utility services exceed \$25,000 at a single delivery point.

The urgency in the renewal of the areawide contract is based upon the expiration of the current areawide contract on August 15, 1987. We have extended the current contract for 90 days, through November 14, 1987, pending the execution of the renewal contract. A copy of the letter extension is enclosed, for your information.

Our records indicate that your agency would be greatly affected if the areawide contract with PSE&G was not renewed. Your facilities would no longer be able to cite the GSA areawide contract GS-00S-67006 as their authority to pay PSE&G's utility bills if the contract is not renewed. Therefore, it is suggested that you contact:

Mr. Louis L. Rizzi
Vice President, Customer and Marketing Services
Public Service Electric and Gas Company
80 Park Place
Newark, NJ 07101

Telephone Number: (201) 430-5757

-2-

Please advise Mr. Rizzi that you are awaiting the execution of the contract, so that you and other Federal agencies may continue to procure services from PSE&G under the areawide contract rather than an individual contract for each PSE&G delivery point. Your letter or call may provide the needed incentive for PSE&G to execute a mutually acceptable areawide contract. We shall also be asking other Federal agencies for similar assistance in obtaining PSE&G's concurrence in the renewal areawide contract.

Your cooperation in this contracting matter is greatly appreciated. If you have any questions concerning the above, please call me or have a member of your staff call Mr. Lindsey Lee, of my staff, on FTS 566-0901 or (202) 566-0901.

Sincerely,

LL
70 3-87
LARRY L. MORRAN
Director, Public
Utilities Services Division
Office of Procurement

Mr. Robert Brockman
Attn: MA30
Department of Energy
Washington, DC 20585

Enclosure

cc: Official/Reading Files - PPU
PP Read, Suspense
PPU:LLee:11:566-0901:9/28/87
AW-86-8PSE&G, pages 86-88/Lindsey

Handwritten:
 H. L. - F-11 FNM - A-20-2
 2-2-84

JAN 31 1984

Mr. Gene VanArsdale
 Deputy Associate Administrator
 for Procurement and Technical Assistance
 Small Business Administration
 1441 "L" Street NW.
 Washington, DC 20416

Dear Mr. VanArsdale:

This is a followup to our meeting with you and Mr. Bill Louis on January 11, 1984. Mr. Louis requested additional information on recommended changes with the flow-through clause for subcontracting plans under Section 211 of Public Law 95-507.

Enclosure 1 is our typical draft subcontracting plan, presently offered to all utility concerns to elicit negotiations. The current flow-through clause, which applies to subcontracts of the Contractor throughout the utility firm, is included on page 4, paragraph F. Enclosure 2 is a revision of this same paragraph F to specify the applicability of the flow-through clause to subcontracts issued to construct and operate facilities which are directly pertinent to serve the Government with public utility services.

This request was made as a result of our ongoing negotiations with a New Mexico utility. The utility has no concerns with the proposed subcontracting plan other than the flow-through clause. We believe that the proposed language changes would allow us to obtain a substantial small business and small disadvantaged business commitment. The planned goals from this utility could possibly exceed \$750,000 each year for the 10-year term of the pending contract.

The utility tentatively agrees to give us a companywide plan, based on the commercial products theory. However, it wants the flow-through aspects of the plan applicable to facilities used to directly serve the Government. Such facilities could be connection charges relating to high-voltage electric transmission and distribution lines and transformers to provide initial or additional electric services to Federal installations over the 10-year term of the proposed contract. Since the Air Force, Army, Department of Energy, Veterans Administration, and our Agency are large purchasers of electric services in New Mexico, the flow-through clause is expected to be used by the utility firm from time-to-time over the next 10 years.

2

We support the utility's request as reasonable. Your approval is requested so as to allow us to close negotiations on the pending plan with the flow-through clause, as set out in Enclosure 2. If you have any questions, please do not hesitate to contact me or Mr. Larry L. Moreau on 366-0901.

Sincerely,

(Signed) John L. Stanberry,

JOHN L. STANBERRY, Ph.D.
Assistant Commissioner
Office of Public Utilities
Public Buildings Service

2 Enclosures

cc:

Mr. Bill Louis-SBA

cc: Official and Reading Files
FU, FUU

PUU:LMOREAUL:adw:1/30/84:n60901

AW-80-6

Concurrence:

Larry L. Moreau 1-31-84
PUU Date

John Harvey 1/31/84
Date

mw
1/31/84

Enclosure 1

SUBCONTRACTING PLAN FOR
SMALL BUSINESS AND
SMALL DISADVANTAGED BUSINESS CONCERNS

Submitted By: _____

CSA Contract No. _____

Date: _____

SUBCONTRACTING PLAN

In accordance with Section 211 of Public Law 95-307, the following Subcontracting Plan is hereby submitted to the General Services Administration, Office of Public Utilities, Washington, DC 20406 by (Company Name) _____

_____ in conjunction with GSA public utility contract number _____.

The administrator of this Subcontracting Plan is Mr./Ms. _____ of _____ and is responsible for compiling data for the Plan and for the regular reviewing, updating, and implementation of this Subcontracting Plan as here set forth.

A. Projected Subcontracting goals and objectives

	<u>Amount</u>	<u>Percent</u>
1. Estimated annual operating and maintenance budget where subcontracting opportunities exist.	\$ _____	_____
2. Estimated subcontracting with large businesses.	\$ _____	_____
3. Estimated subcontracting with the small business community including small disadvantaged business concerns.	\$ _____	_____
a. Estimated subcontracting with only small disadvantaged business concerns.	\$ _____	_____

B. Small Business Sources

The following sources were used to identify small business and small disadvantaged business concerns:

- _____ Company resource lists
- _____ Contracts initiated by small business or small disadvantaged business concerns themselves
- _____ Referrals by other small business firms
- _____ Advertising by small business
- _____ Local small business and minority associations
- _____ State small business directories
- _____ The small business and disadvantaged small business source identification system provided by the Small Business Administration's Procurement Automated Source System

_____ The National Minority Purchasing Council Vendor Information Service
 _____ The Department of Commerce, Office of Minority Business Data Center,
 National Minority Business Directory
 _____ The Department of Labor, Surplus Trends Directory
 _____ Other:

C. Principal Current Company Subcontracts

Products and Services where small business subcontracting is most probable.

Products or services where small disadvantaged business subcontracting is most probable.

D. Subcontracting For Indirect Goods Or Services

Are indirect or overhead costs used in developing this Subcontracting Plan? Yes No If yes, the method used in determining the proportionate share of indirect and overhead cost incurred with (i) small business, and (ii) small disadvantaged business subcontractors is described below:

E. Measures To Promote Equal Opportunities

In order to insure that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals will have and equitable opportunity to compete for subcontracts _____ will:

1. Maintain a program designed to locate capable small business and small disadvantaged business sources for current and future subcontracting opportunities.
2. Review company policies and procedures to assure and encourage equitable opportunity to small business and small disadvantaged business concerns in letting subcontracts.
3. Coordinate inquiries and requests for advice from small business and small disadvantaged business concerns.

4. Assure that participation of small and disadvantaged business concerns is accurately reported.

5. Review acquisition programs for possible breakout of items suitable for acquisition from small and disadvantaged business concerns.

6. Other:

F. Company-Wide Policy Statement

old way _____ will include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts of \$10,000 or more, which offer further subcontracting opportunities, and will insert a provision in its subcontracts which will require all subcontractors (except small business concerns) who receive subcontracts of \$500,000.00 or more, which offer further subcontracting opportunities to adopt a plan similar to the plan in accordance with the requirements of Public Law 95-507, 15 USC 637.

_____ will provide a competitive opportunity for suppliers-small, large, local, minority, national, and international, to qualify for and earn a share of our firm's current or long-term purchase volume, commensurate with the merits of their offerings and their proven qualifications or demonstrated performance as suppliers.

_____ has and will continue to utilize small and small disadvantaged business concerns to the greatest extent practicable consistent with efficient performance of all contracts or subcontracts.

C. Statement on Periodic Reports

_____ will submit such periodic reports and cooperate in any studies or surveys as may be required by the contracting agency or the Small Business Administration in order to determine the extent of contractor compliance with the small and small disadvantaged business subcontracting plan. Internal reports regarding the Subcontracting Plan will be prepared on a regular basis, at least quarterly.

H. Records To Be Maintained

In regard to this Subcontracting Plan the following records will be maintained:

1. Small and disadvantaged business source lists, guides and other data identifying small and small disadvantaged business vendors.
2. Organizations contacted for small and disadvantaged business sources.
3. Records to support other outreach efforts:
 - a. Contacts with minority and small business trade associations
 - b. Contacts with business development organizations
 - c. Attendance at small and minority business procurement conference and trade fairs
4. Records to support internal activities to guide and encourage buyers:
 - a. Workshops, seminars, training programs, etc.
 - b. Monitoring activities to evaluate compliance
5. On a contract-by-contract basis, records to support award data submitted to the Government to include name and address of subcontractor.
- I. Examples of Current Small Business Subcontractors and Supplies

Attached as Appendix A is a list of subcontractors which qualify as small businesses that are currently providing services or supplies to _____

APPENDIX A

Name of Subcontractor

Product or Service

Address

Provided

Telephone Number

Doc 6088A Disk D240A
Revised 5/4/82

Enclosure 2

SUBCONTRACTING PLAN FOR
SMALL BUSINESS AND
SMALL DISADVANTAGED BUSINESS CONCERNS

Submitted By: _____

GSA Contract No. _____

Date: _____

SUBCONTRACTING PLAN

In accordance with Section 211 of Public Law 95-507, the following Subcontracting Plan is hereby submitted to the General Services Administration, Office of Public Utilities, Washington, DC 20406 by (Company Name) _____

_____ in conjunction with GSA public utility contract number _____.

The administrator of this Subcontracting Plan is Mr./Ms. _____ of _____ and is responsible for compiling data for the Plan and for the regular reviewing, updating, and implementation of this Subcontracting Plan as here set forth.

A. Projected Subcontracting goals and objectives

	<u>Amount</u>	<u>Percent</u>
1. Estimated annual operating and maintenance budget where subcontracting opportunities exist.	\$ _____	_____
2. Estimated subcontracting with large businesses.	\$ _____	_____
3. Estimated subcontracting with the small business community including small disadvantaged business concerns.	\$ _____	_____
a. Estimated subcontracting with only small disadvantaged business concerns.	\$ _____	_____

B. Small Business Sources

The following sources were used to identify small business and small disadvantaged business concerns:

- _____ Company resource lists
- _____ Contracts initiated by small business or small disadvantaged business concerns themselves
- _____ Referrals by other small business firms
- _____ Advertising by small business
- _____ Local small business and minority associations
- _____ State small business directories
- _____ The small business and disadvantaged small business source identification system provided by the Small Business Administration's Procurement Automated Source System

- _____ The National Minority Purchasing Council Vendor Information Service
- _____ The Department of Commerce, Office of Minority Business Data Center,
National Minority Business Directory
- _____ The Department of Labor, Surplus Trends Directory
- _____ Other:

C. Principal Current Company Subcontracts

Products and Services where small business subcontracting is most probable.

Products or services where small disadvantaged business subcontracting is most probable.

D. Subcontracting For Indirect Goods Or Services

Are indirect or overhead costs used in developing this Subcontracting Plan? Yes No If yes, the method used in determining the proportionate share of indirect and overhead cost incurred with (i) small business, and (ii) small disadvantaged business subcontractors is described below:

E. Measures To Promote Equal Opportunities

In order to insure that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals will have and equitable opportunity to compete for subcontracts _____ will:

1. Maintain a program designed to locate capable small business and small disadvantaged business sources for current and future subcontracting opportunities.
2. Review company policies and procedures to assure and encourage equitable opportunity to small business and small disadvantaged business concerns in letting subcontracts.
3. Coordinate inquiries and requests for advice from small business and small disadvantaged business concerns.

4. Assure that participation of small and disadvantaged business concerns is accurately reported.
5. Review acquisition programs for possible breakout of items suitable for acquisition from small and disadvantaged business concerns.
6. Other:

F. Companywide Policy Statement

New way

_____ will include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts of \$10,000 or more, which offer further subcontracting opportunities. _____ will insert a provision in its subcontracts which will require all subcontractors (except small business concerns) who receive subcontracts to construct or operate facilities directly pertinent to serve the Government of \$500,000.00 or more, which offer further subcontracting opportunities, to adopt a plan similar to the plan in accordance with the requirements of Public Law 95-507, 15 USC 637.

_____ will provide a competitive opportunity for suppliers-small, large, local, minority, national, and international, to qualify for and earn a share of our firm's current or long-term purchase volume, commensurate with the merits of their offerings and their proven qualifications or demonstrated performance as suppliers.

_____ has and will continue to utilize small and small disadvantaged business concerns to the greatest extent practicable consistent with efficient performance of all contracts or subcontracts.

C. Statement on Periodic Reports

_____ will submit such periodic reports and cooperate in any studies or surveys as may be required by the contracting agency or the Small Business Administration in order to determine the extent of contractor compliance with the small and small disadvantaged business subcontracting plan. Internal reports regarding the Subcontracting Plan will be prepared on a regular basis, at least quarterly.

H. Records To Be Maintained

In regard to this Subcontracting Plan the following records will be maintained:

1. Small and disadvantaged business source lists, guides and other data identifying small and small disadvantaged business vendors.
2. Organizations contacted for small and disadvantaged business sources.
3. Records to support other outreach efforts:
 - a. Contacts with minority and small business trade associations
 - b. Contacts with business development organizations
 - c. Attendance at small and minority business procurement conference and trade fairs
4. Records to support internal activities to guide and encourage buyers:
 - a. Workshops, seminars, training programs, etc.
 - b. Monitoring activities to evaluate compliance
5. On a contract-by-contract basis, records to support award data submitted to the Government to include name and address of subcontractor.

I. Examples of Current Small Business Subcontractors and Supplies

Attached as Appendix A is a list of subcontractors which qualify as small businesses that are currently providing services or supplies to _____

APPENDIX A

Name of Subcontractor
Address
Telephone Number

Product or Service
Provided

Doc 6088A Disk D240A
Revised 3/4/82



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 24 1984

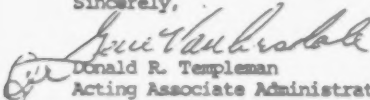
Dr. John L. Stanberry
Assistant Commissioner
Office of Public Utilities
Public Buildings Service
General Services Administration
Washington, D.C. 20405

Dear Dr. Stanberry:

Reference is made to your letter to Mr. Gene VanArsdale dated January 31, 1984, requesting approval of a revision to the "flow-through" clause to specify its applicability to subcontracts issued to construct and operate facilities which are directly pertinent to serve the Government with public utility services.

The Small Business Administration (SBA) concurs in the use of the revision to the "flow-through" clause cited above.

Sincerely,


Donald R. Templeman
Acting Associate Administrator
for Procurement and Technical Assistance

The General Services Administration submitted the following for the record:

A search of pertinent records of the GSA Public Buildings Service and Office of General Counsel was conducted and no internal memoranda concerning GSA's consideration of legal recourse were identified. The attached letter to the Department of Justice requesting a legal opinion is, however, a part of our files.

AUG - 5 1985

Ralph W. Tarr, Esquire
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Re: Request for Legal Opinion on Applicability
of Section 211 of P.L. 95-907 to the Federal
Government's Purchases of Utility Services

Dear Mr. Tarr:

The General Services Administration (GSA) requests your consideration of, and legal opinion on, the following question:

Is a public utility, which provides utility services under tariff to the Federal Government, but which refuses to enter into a formal contract with the Government covering those utility services, nonetheless legally required to satisfy the subcontracting plan requirement of Section 211 of Public Law 95-507?

The need for your guidance on this question arises from GSA's responsibilities under Section 201 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481). Pursuant to that Act, GSA enters into contracts with public utility firms serving Federal agencies. These contracts generally cover Federal procurements from a particular utility company, and apply for a term of up to 10 years. Pursuant to various Federal statutes, Executive Orders, and implementing regulations, GSA is required to include various clauses in all such utility contracts exceeding a certain dollar threshold. Mandatory contract clauses cover such areas as equal employment opportunities, hiring the handicapped, and clean air and water standards.

Of immediate concern to GSA is the mandatory clause pertaining to the primary contractor's use of small business and small disadvantaged business concerns in its subcontracting activity. Section 211 of Public Law 95-507 amended Section 8(d) of the Small Business Act to strengthen the requirement for using small businesses as subcontractors. See 15 U.S.C. 637(d). The following language, for example, must now be included in all contracts let by a Federal agency (15 U.S.C. 637(d)(3)(A)(B):

(A) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. . .

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

Exceptions to the applicability of this general clause include contracts whose value does not exceed \$10,000; contracts which, including all associated contracts, will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; and contracts for services which are personal in nature. 15 U.S.C. 637(d)(2).

With regard to the contractor's responsibility to develop a specific subcontracting plan, Section 211 of P.L. 95-507 further provided (15 U.S.C. 637(d)(4)(B)):

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000 in the case of all other contracts; and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

Similar provisions are applicable to contracts awarded pursuant to formal advertising. 15 U.S.C. 637(d)(5).

It should be noted that, since the Government is such a high volume purchaser of utility services, the \$500,000 threshold requirement is easily obtained with most public utilities throughout the country.

3

The Office of Federal Procurement Policy (OFPP) has issued Policy Letter 80-2 to Heads of Executive Departments and Establishments, to provide regulatory guidance on Section 211 of P.L. 95-507. This Policy Letter required, among other matters, that certain records be maintained for all contracts requiring a subcontracting plan. These records included source lists, or small business/small disadvantaged business vendor organizations contacted by the contractor to obtain sources; a record of each individual solicitation over \$10,000 and whether or not any small business/small disadvantaged businesses were solicited, and if not, why not, and if such a business made an offer on the subcontract, or was solicited, why it failed to get the award; records of other outreach efforts by the contractor; records of internal activities to guide and motivate buyers; and a record which will support the award data provided to the Government in reports. OFPP Policy Letter 80-2, Sections C(3)(f) and (E)(3)(f).*

In response to a query from GSA, the OFPP confirmed that the subcontracting plan provisions of P.L. 95-507 apply to contracts between the Government and a utility despite the monopoly position of the utility. See Appendix A. In addition, it is clear that Congress intended the subcontracting provisions of P.L. 95-507 to apply not only to competitive procurements (whether negotiated or not), but also to noncompetitive, negotiated sole source contracts such as those involved with regulated utilities. In a House Conference Report on what became P.L. 95-507, the conferees stated:

It is the intent of the conferees that these subcontracting requirements are not to be construed as being limited to competitively negotiated procurements. Each year executive agencies award large amounts of noncompetitive negotiated (sole source) contracts which provide opportunities for subcontracting. Federal agencies should make provisions to insure that, prior to the award of such contracts, contractors be required to submit contracting plans.

H.R. Rep. No. 95-1714, 95th Cong., 2d Sess. 26, reprinted in (1978) U.S. Code Cong. & Adm. News 3879, 3887.

*OFPP Policy Letter 80-2 was published as part of FPR Temp. Reg. 50, Supp. 2, 45 Fed. Reg. 31028 (May 9, 1980). Similar requirements are contained in the Federal Acquisition Regulation (FAR). See FAR 52.219-9.

While GSA has had success in entering into written contracts with the majority of the utility firms we deal with, and we currently administer a substantial small business subcontracting program with a value approaching \$400 million per year, a few companies have refused to sign such contracts for reasons which include their objection to the subcontracting plan requirement. These firms contend that this contractual provision would impose upon them unnecessary burdens of reporting and record keeping, and would increase their management costs and hence the cost of utility services to all of their customers. These firms argue that GSA lacks authority to insist upon compliance with the subcontracting plan requirement of P.L. 95-507 because, as a regulated industry, utilities are "involuntary contractors" in the sense that they are required by law to provide utility services to all customers and to provide these services under the terms and conditions specified in tariffs approved by state regulatory commissions.

Since public utilities typically occupy a monopoly position within their service territory, the Federal Government is unable to turn to competing bidders willing to supply us with these essential services under written contract. In the absence of a written contract with the only available provider, the Government must purchase utility services through more informal means such as purchase orders or even phone calls.

One example of this problem involves the Potomac Electric Power Company (PEPCO), with sales to the Government of \$200 million per year. PEPCO has recently refused to prepare a subcontracting plan for GSA's review and approval. (See attached correspondence in Appendix B). PEPCO considers its existing service relationship with GSA, by which it serves the government pursuant to tariffs, to be an exception to the P.L. 95-507 subcontracting requirements, since no negotiated contract is involved. GSA disagrees with this view.

It is in this context that GSA requests the opinion of your Office on whether, absent a formal contract, utility companies are bound to satisfy requirements pertaining to subcontracting policy and plans. It is GSA's position that public utility companies are so bound. The language of P.L. 95-507, a respect for its underlying purpose, and the holdings of two circuit court decisions, all lend support to this position.

The provisions of Section 8(d) of the Small Business Act, 15 U.S.C. 637(d), pertaining to subcontracting plan requirements for Federal prime contracts are, in our view, quite explicit. Paragraph (4)(B) of the cited legislation (15 U.S.C. 637 (d)(3)(B)), specifically applicable here, establishes the requirement for an acceptable subcontracting plan, "before the award of any contract to be let, . . . by any Federal agency. . ." (underscoring added), where four identified technical factors are present. The sole exemption from this statutory requirement is found at paragraph (7) of Section 8(d), as follows (15 U.S.C. 637(d)(7):

3

(7) The provisions of paragraph (4), (5), and (6) shall not apply to offerors or bidders who are small business concerns.

It therefore is our opinion that had Congress intended to exempt from the subcontracting plan requirement any category of Federal contractors other than small business firms, such as regulated industries, that intent would likewise have been reflected in paragraph (7) of Section 8(d).

The underlying purpose of the subcontracting provisions of P.L. 95-507 is clear, viz., to provide the maximum practical opportunity for small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, to participate in the performance of contracts let by any Federal agency. There is no policy justification for distinguishing between written contracts and less formal arrangements under tariffs for utility services provided to Federal users.

An argument identical to that advanced by non-complying utility companies (i.e., that the absence of a written contract with the Government relieves the utility of any responsibility under P.L. 95-507) was rejected by the court in United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977) and Mississippi Power and Light Co. v. U.S., 553 F.2d 480 (5th Cir. 1977), vacated and remanded on other grounds, 436 U.S. 982 (1978). Those cases, which deal with the failure of two public utilities to comply with Executive Order 11246 which prohibits employment discrimination by Government contractors, establish that the provision of utility services under tariff is to be considered a contract, and that mandatory Federal contract clauses are applicable to such utility service providers even without the formal consent of the utility company. The court's reasoning is captured in the following lengthy, but highly relevant, paragraph:

The New Orleans Public Service Company (NOPSI) implies, in addition, that because of its public-utility status, imposition of the Executive Order's requirements would be unfair. The unfairness, the company suggests, stems from NOPSI's lack of choice as to whether to accept the Government's business. However, the fact that NOPSI is a public utility militates strongly in favor of allowing the Government to impose the obligations of the Executive Order on the company. NOPSI's franchise gives it a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas. A monopolistic government supplier, unlike a seller in an ordinary market, has the economic power to resist the Executive Order. In the situation under consideration, the Government needs to buy

6

electric energy in the New Orleans area. If NOPSI were allowed to prevail in its contentions, the Government would have to either acquiesce or else go without necessary services. Obviously, a local utility cannot force such a dilemma upon the Government. Otherwise, a valid and important nationwide federal program, set in place by the President over a third of a century ago, continued by every one of his successors, approved by Congress and applicable to all government contractors, could be nullified by any seller with a monopoly in a service, supply or property needed by the Government, just by virtue of the seller's economic position. Here, NOPSI's monopoly exists only because of local legislative action. The supremacy clause of the Constitution obviously cannot countenance such a result. We hold, therefore, that the Government can compel NOPSI to comply with the equal opportunity obligations of Executive Order 11246, even though the company has not expressly consented to be bound by that Order.

United States v. New Orleans Public Service Company, Inc., supra, at 470.

The views of your office on this issue would be of great assistance to GSA, and would be particularly helpful in our ongoing discussions with utility firms, such as PEPCO. Accordingly, we would appreciate receiving the authoritative guidance of your office in the form of an opinion responding to the question posed at the beginning of this letter.

Please feel free to call Sumner J. Katz, the GSA contact person, at 566-1156, if you require further information on this request.

Sincerely,

(Signed) ALLIE B. LATIMER

ALLIE B. LATIMER
General Counsel

Attachments

cc: Official File - LK
Reading File - LK
LK: SJKatz/MJEttner:dml:7/31/85cc566-1156

APPENDIX A

APPENDIX A



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

September 17, 1980

Mr. Gerald McBride
Assistant Administrator for
Acquisition Policy
General Services Administration
Washington, D.C. 20405

Dear Jerry:

This is in response to your letter of June 23, 1980, concerning the implementation of Public Law 95-507 in contracts for public utilities, and confirms our discussion on July 30, 1980, in my office.

The problem, as I understand it, is that the public utility firms are having special difficulty in providing subcontracting plans as required by P.L. 95-507. This stems in large part from apparent inconsistencies with the requirements of State laws and State regulatory bodies wherein services and supplies must be obtained from the lowest cost subcontractor. It is their assertion that, as a result, costs associated with procurements from other than the low-cost subcontractor would be disallowed in rate-increase proceedings. Thus, the utility firms' position seems to be based on an apprehension that establishing goals for awards to small and minority firms will result in paying higher prices for goods and services, which would result in lower return on investment to their stockholders if resulting rate increases would not be authorized.

The utility companies are in a monopoly position. The only alternative apparently available to the Government if it cannot consummate an area-wide contract with a utility company, is to allow each "user" in the area to purchase its power separately, at full commercial rates and an increased cost to the Government. While we cannot exempt utility firms from compliance with P.L. 95-507, I believe there is adequate flexibility in the statute to permit these firms to comply with the statute without violating state laws or running afoul of their regulatory commissions or other rate setting bodies.

First, I think we can all agree that the services we are buying from utility companies may be treated the same as "commercial products." This means that a utility company would submit one company-wide annual plan covering its entire operations.

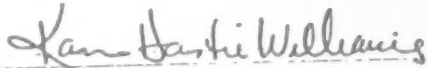
Second, P.L. 95-507 does not authorize the payment of a differential in order to subcontract with small and minority firms. The statute does require the establishment of percentage goals by taking steps to assure that small and small disadvantaged firms have an equitable opportunity to compete for subcontracts. This does not mean "business as usual," though in some cases, a company may have an ongoing program which is entirely acceptable. But neither does it mean

rejecting longstanding proven suppliers and paying premium prices simply to achieve a goal. It does require a conscious and conscientious "outreach" program to locate small and small disadvantaged sources and to facilitate their participation in competing for subcontracts.

Finally, the goal should be realistic and the efforts to achieve it should be more than token. If a firm makes a good faith effort and yet fails to achieve a goal, the contracting officer and the contractor should review the contractor's program to see what more might be done. An SBA monitoring system is being developed to assist in this process. However, it is essential to set goals rather than rely solely on "best efforts." If a firm is willing to make a conscientious effort to assure subcontract opportunities to small and small disadvantaged businesses, it should not object to setting a realistic target against which to measure the efficacy of its efforts.

I hope this analysis will assist GSA in successfully concluding negotiations with the public utility firms.

Sincerely,



Karen Hastie Williams
Administrator

APPENDIX B

JUL 16 1984

APPENDIX B.

POTOMAC ELECTRIC POWER COMPANY

1900 PENNSYLVANIA AVE., N. W.

WASHINGTON, D. C. 20006

(202) 878-2300

ALAN G. KIRK II
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

July 13, 1984

John L. Stanberry, Ph.D.
Assistant Commissioner
General Services Administration
Office of Public Utilities
Public Buildings Service
Washington, D.C. - 20405

Dear Dr. Stanberry:

Your June 27th letter to Mr. Mitchell has been forwarded to me for response. In your letter, you requested that PEPCO "prepare a subcontracting plan as soon as possible for...[GSA's] review and approval." Notwithstanding the absence of an areawide contract with GSA, you have suggested that PEPCO is required to prepare and submit such a plan by Public Law 95-507, under the reasoning of United States v. New Orleans Public Service Company, Inc., 553 F.2d 459 (5th Cir. 1977).

~~I do not share your interpretation of Public Law 95-507 as mandating GSA approval of a PEPCO formal subcontracting plan based on the existing service relationship.~~

Please note that applicability of 15 U.S.C. §637(d)(4)(B) requires negotiation of a subcontracting plan only, among other things, if: 1) the procurement was negotiated (See, 4(B)(i)); and 2) the contract is currently being let, modified or amended (See, 4(B)). Since PEPCO continues to serve the government pursuant to tariff, those conditions do not appear to be satisfied.

In reviewing the subcontracting plans which you enclosed, however, we remain convinced that PEPCO's efforts in this area have been extremely effective. While I find no requirement to submit a formal subcontracting plan for GSA review and approval, I have no objection to describing to GSA PEPCO's development program for informational purposes, if that would be helpful to you. Should you wish PEPCO to provide information concerning its program with this understanding, please let me know, and we can make whatever arrangements seem appropriate.

Very truly yours,



cc: Mr. Edward F. Mitchell

JUN 27 1984

Mr. Edward Mitchell
President
Potomac Electric Power Company
1900 Pennsylvania Avenue, NW.
Washington, DC 20063

Dear Mr. Mitchell:

Thank you for your letter of May 24, 1984, in which you indicated that Potomac Electric Power Company (PEPCO) remains uninterested in entering into an areawide contract with the General Services Administration (GSA) for electric services to all the Federal agencies. You also indicate that you are in compliance "with the full spirit of the [Government's] small business program."

Naturally, I am somewhat disappointed with your response, since Federal agencies purchase nearly 17 percent of your annual sales or \$200 million per year. We believe that the law requires PEPCO and GSA to regularize their relations by entering into formal contracts for the purchase of electric utility service. The law is straightforward on this point.

In 1949, Congress directed GSA to procure and supply services for the use of Federal executive agencies. The period for contracts for public utility services could be as long as 10 years. 40 U.S.C. 481(a)(3).

Regulations were issued to implement that directive, first in the Federal Procurement Regulations, Title 41 of the Code of Federal Regulations (CFR), Subpart 1-4.4 and now, effective April 1, 1984, in the Federal Acquisition Regulation, 48 CFR, Chapter 1, Subpart 8.3. In both the new and old regulations, formal bilateral contracts are required for utility services or connections exceeding a certain minimum. See 48 CFR 1-8.302 and 1-8.304-5; 41 CFR 1-4.410-2(c). Since Federal purchases from PEPCO exceed the current \$25,000 threshold, then formal contracts between PEPCO and the Government are mandated. Local laws and regulations do not supplant Federal procurement requirements.

As you mentioned in your letter, we also discussed Federal laws related to the small business program, in particular the subcontracting program plan for small businesses and small disadvantaged business concerns as prescribed by Congress in Section 211 of Public Law 95-507 (15 U.S.C. 637(d)). Our first choice would be for PEPCO to develop such a plan as part of an areawide contract. If, however, you persist in your view that such a formal contract is neither required nor desirable, we request that you nevertheless prepare a subcontracting plan as soon as possible for our review and approval.

I am sure you are wondering whether such a plan is required in the absence of a formal, written agreement. The answer, we believe, is in the affirmative. There is, for example, a case that went to the Supreme Court involving a utility's refusal to comply with the provisions of Executive Order 11246, which prohibits employment discrimination. The utility argued that it was not required to abide by the Executive order since it had no formal written agreement with the Government and only provided service under the tariffs. The court concluded that there was a

2

contractual relationship between the utility and the Government, and that the mandatory Federal contract clause was applicable to the utility even without a formal agreement. The court's reasoning is captured in the following lengthy, but highly relevant, paragraphs:

[The New Orleans Public Service Company (NOPSI)] implies, in addition, that because of its public-utility status, imposition of the Executive Order's requirements would be unfair. The unfairness, the company suggests, stems from NOPSI's lack of choice as to whether to accept the Government's business. However, the fact that NOPSI is a public utility militates strongly in favor of allowing the Government to impose the obligations of the Executive Order on the company. NOPSI's franchise gives it a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas. A monopolistic government supplier, unlike a seller in an ordinary market, has the economic power to resist the Executive Order. In the situation under consideration, the Government needs to buy electric energy in the New Orleans area. If NOPSI were allowed to prevail in its contentions, the Government would have to either acquiesce or else go without necessary services. Obviously, a local utility cannot force such a dilemma upon the Government. Otherwise, a valid and important nationwide federal program, set in place by the President over a third of a century ago, continued by every one of his successors, approved by Congress and applicable to all government contractors, could be nullified by any seller with a monopoly in a service, supply or property needed by the Government, just by virtue of the seller's economic position. Here, NOPSI's monopoly exists only because of local legislative action. The supremacy clause of the Constitution obviously cannot countenance such a result. We hold, therefore, that the Government can compel NOPSI to comply with the equal opportunity obligations of Executive Order 11246, even though the company has not expressly consented to be bound by that Order.

United States v. New Orleans Public Service Company, Inc.
553 F.2d 459, 470 (5th Cir. 1977).

We would, then, appreciate receiving at your earliest convenience a subcontracting plan from PEPCO as required by Public Law 95-607. To assist you, I have enclosed copies of approved subcontracting plans submitted by other utilities. In addition, I and my staff, in particular Mr. Larry Moreau, are available to advise and help your people in the development of the plan.

We are also available for further negotiations on an areawide contract if you conclude that such negotiations should take place. Our telephone number is 866-6190.

3

Thank you for the time and effort you are taking to review this matter. I am confident that any remaining disagreements between us can be resolved amicably.

Sincerely,

(Signed) John L. Stanberry

JOHN L. STANBERRY, Ph.D.
Assistant Commissioner
Office of Public Utilities
Public Buildings Service

Enclosures

CONCURRENCE:

LK _____ Date _____

PUU _____ Date _____

AU _____ Date _____

cc: Official File - LK
Reading File - LK

LKdJKEatzdmls/18/84rx566-1156

POTOMAC ELECTRIC POWER COMPANY

1900 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20006

EDWARD F. MITCHELL
PRESIDENT

May 24, 1984

John L. Stanberry, Ph.D.
Assistant Commissioner
General Services Administration
Office of Public Utilities
Public Buildings Service
Washington, D.C. 20405

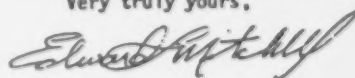
Dear Dr. Stanberry:

I appreciate your taking the time to visit with me and discuss your interest in having PEPCO sign an areawide public utility service contract with GSA.

Since our meeting I have had the opportunity to discuss this matter with our attorneys who advise me that the "contract" between PEPCO and its federal customers is contained in the relevant General Terms and Conditions approved by the Public Service Commission. They have endeavored to understand the legal basis for your position that an areawide contract is required, and have been unsuccessful in that endeavor. In fact, they point out to me the inconsistencies inherent in trying to provide service under two "contracts".

We are, we believe, in compliance with all relevant statutes and with the full spirit of the small business program to which you referred, and I must confess that I find reasonable the position of our attorneys that there is nothing significant to be gained by signing an areawide contract. Perhaps that position could be influenced by a clear and cogent statement supporting the legal necessity for such a contract. In the absence of compelling legal argument, I must conclude that it would not be in the best interests of PEPCO for us to sign such a contract.

Very truly yours,





General Services Administration
Federal Supply Service
Washington, DC 20406



MAR 3 1 1988

MEMORANDUM FOR DISTRIBUTION LIST - ALL FSS PROCURING ACTIVITIES
(FCP DISTRIBUTION LIST)

FROM: WALTER L. ECKBRETH
DIRECTOR *W. L. Eckbreth*
PROCUREMENT MANAGEMENT DIVISION (FCP)

SUBJECT: Procurement Information Bulletin 88-4

ARE YOUR CALCULATIONS RIGHT????

When calculating the dollar value of a contract to determine if a firm should submit a subcontracting plan, in accordance with FAR 19.702, remember to include the dollar value of any options.

For multi-year contracts, the total contract value should be considered when determining if a subcontracting plan should be submitted.

This goes for EEO clearances as well. When calculating whether the estimated amount of a proposed contract is expected to aggregate \$1 million or more, the amount of the contract must include the dollar value of any options or in the case of multi-year contracts, the total dollar value of the contract.

The General Services Administration submitted the following for the record:

A draft areawide contract was submitted to BG&E on September 23, 1980. BG&E failed to respond to numerous follow-up letters. Finally, on September 3, 1981, BG&E responded that it does not see that the submitted example subcontracting plan as being related to the areawide contract. On April 28, 1982, BG&E declined to meet with GSA to discuss contracting requirements. After trying to get BG&E to execute contract, GSA closed contracting action as of April 30, 1984, informing agencies that they were to pursue the contract with BG&E on an individual basis. On July 27, 1984, GSA's Region 3 sent a contract for three individual facilities to BG&E. These contracts all contained the subcontracting plan requirement. BG&E again failed to execute these contracts. Copies of pertinent correspondence are attached.

JUL 27 1984

Mr. George V. McGowan, President
Baltimore Gas & Electric Company
P.O. Box 1475
Baltimore, MD 21203

Dear Mr. McGowan:

Enclosed are four (4) copies of proposed contract GS-03B-42107 for providing electrical service at the Friendship Building 42, 720 Ridgely Landing Road, Linthicum, Maryland.

This contract supersedes our letter, dated June 24, 1981.

Please sign three (3) copies and return them for signature by the Contracting Officer. After final execution of the contract, one (1) copy will be returned to you for your records.

Should you require additional information please contact Deborah O'Rourke on (301) 991-1111.

Sincerely,

151

JOSEPH D. BALACINO
Contracting Officer

Enclosure

cc: Official File 3PPB
Reading File 3PPB, 3PP, PUU
D. O'Rourke/gml/7-1131/7/19/84

APR 30 1984

Mr. George V. McGowan
President
Baltimore Gas and Electric Company
P.O. Box 1475
Baltimore, MD 21203

Dear Mr. McGowan:

This is our last followup to our letter dated December 2, 1983, concerning the areawide public utility contract between Baltimore Gas and Electric Company and the General Services Administration. Our Draft No. 3 of the proposed contract has been pending your company's execution since September 16, 1982. We requested in our letter of February 16, 1984, that the pending contract negotiations be concluded within 60 days. As of the date of this letter, we have not heard from your company regarding this public utility contracting matter.

Based on our past correspondence and other discussions with your company, we have reached the conclusion that Baltimore Gas and Electric is not interested in finalizing the negotiations which began in 1978. We are, therefore, closing our case files for lack of interest on your company's part. Should you decide in the future to enter into the areawide public utility contract, please let us know.

In the performance of our public utility management function on behalf of all Federal agencies, we are advising all the agencies in your company's service area of your cancellation of contract negotiations (enclosure 1). We are also enclosing an informational copy of the letter of notification, which is being mailed to the contracting officers of the affected agencies (enclosure 2). As you will note, the agencies are being advised that the alternative for them is to individually undertake the task of purchasing their gas, electric, and steam services from your company by processing separate contracts for each delivery point with purchases exceeding a value of \$25,000 annually.

Even though our areawide contracting attempts have been unsuccessful, we appreciate the time devoted to the matter by your company's personnel. Should your company become interested at a later date in renewing these contract negotiations, we shall be pleased to participate in any way feasible. Also, we are available for phone discussions on (202) 566-0901.

Sincerely,

LM
4-20-84
LARRY L. MOREAU
Director, Public
Utilities Services Division
Office of Public Utilities
Public Buildings Service

2 Enclosures

Doc 3350A Nick 0051A

4/17/84



CHARLES CENTER • P.O. BOX 1475 • BALTIMORE, MARYLAND 21203

J. A. SCHULZ
Attorney

April 28, 1982

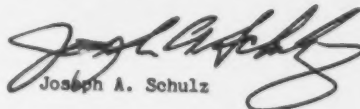
Mr. Larry L. Moreau
Director, Public Utilities Services Div.
General Services Administration
Transportation and Public Utilities Service
Washington, D.C. 20406

Dear Mr. Moreau:

Your recent letter to Mr. Bryant regarding the GSA proposed areawide contract has been referred to me for response. The letter suggests that a meeting be held to discuss the BG&E concerns with regard to the proposed contract. I must decline your offer on behalf of our Company. We see no useful purpose for having such a meeting.

It is our view that the BG&E concerns cannot be resolved by your office. As I indicated to Mr. Chhabra in our telephone conversation, BG&E is unwilling to agree to paragraph 7 of the so-called "equal opportunity clause". This paragraph could require BG&E to cease doing business with or take other action against a vendor who has fulfilled all of its obligations to us and whose product may be crucial to our operation. In our opinion, the Federal Regulations, 41 CFR §60-1.4(a) make it mandatory for GSA to include the entire seven paragraphs of the clause in each of your contracts. Your own letter references this problem with the phrase, "In order for us to address your concerns within the authority of our office" (Emphasis added). In our opinion, this is a problem that cannot be resolved without a change in the regulations.

Respectfully yours,


Joseph A. Schulz

JAS:jd

cc: Messrs. R. C. Bryant
J. A. Biddison, Jr.

APR 2 1982

Mr. Raymond C. Bryant
 Vice President, Consumer Services
 Baltimore Gas and Electric Company
 P.O. Box 1475
 Baltimore, MD 21203

Dear Mr. Bryant:

This follows the March 12, 1982, telephone conversation with Mr. Harbans Chhabra, of my staff, regarding the status of our proposed areawide contract between your company and the General Services Administration (GSA). During that call, you shared your concerns with us pertaining to the proposed contract.

In order for us to address your concerns within the authority of our office and to discuss the remaining terms of our contract, we believe that a useful purpose would be served by a meeting at our office in Washington. Our Assistant Commissioner, Dr. John Stanberry, is taking a personal interest in the GSA areawide contract with your company and would like to attend this meeting. We would schedule this meeting at you and your legal staff's convenience. Please call us on (202) 275-5089 so that we can arrange the meeting date and time.

Sincerely,

H. Chhabra

for
 LARRY L. MORFAN
 Director, Public
 Utilities Services Division
 Office of Public Utilities

cc:

Mr. Schultz

TUS: KML 3-30-82

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AW 78-8



CHARLES CENTER • P.O. BOX 1475 • BALTIMORE, MARYLAND 21203

RAYMOND C. BRYANT
VICE PRESIDENT
CONSUMER SERVICES

September 3, 1981

Mr. Larry L. Moreau, Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, D.C. 20406

Dear Mr. Moreau:

This is in response to your letter of July 27, 1981, to Mr. G. V. McGowan, regarding the GSA proposed areawide contract and the Gulf States Utilities Company subcontracting plan. Mr. McGowan has asked me to review this matter and respond.

We have again studied your proposed areawide contract, and it still fails to satisfy our original and ongoing objections. I believe we have clearly stated those items which are unacceptable to us and which actually constitute only a relatively small portion of the proposed contract. Until these items can be negotiated, we find our current contracts completely acceptable.

As we do not see the Gulf States Utilities Company's subcontracting plan as necessarily related to the areawide agreement, we do have it under active review. When we have formulated our position, we will be most happy to inform you of our findings.

Sincerely yours,

Raymond C. Bryant
Vice President
Consumer Services

RCB:mjd

(301) 234-6111

JUL 27 1981

Mr. G. V. McGowan
President
Baltimore Gas & Electric Co.
P.O. Box 1475
Baltimore, MD 21203

Dear Mr. McGowan:

For sometime, we have been contacting your company by mail and telephone with hopes of reaching an agreement which will result in the execution of the proposed areawide contract between your company and the General Services Administration. The agreement would include the development of the required subcontracting plan associated with this contract (Contract No. GS-C08-67057). I am sincerely concerned over the lack of progress in this matter.

As mentioned in our earlier correspondence, the areawide contract greatly simplifies the procurement of utility services for all Federal agencies as well as the supplying utility. It does not serve as a hindrance to the utility company, but as an aid. It would merely streamline and simplify the procurement and contractual procedures for both parties.

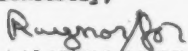
We have mentioned previously the subcontracting plan required to implement section 211 of Public Law 95-507. While some companies have viewed the requested plan as burdensome, other utilities, after investigation, have found that they are already in compliance with this law. Meeting the specific requirements of this law simply requires formalization of procedures already in effect.

Enclosed is a copy of the Gulf States Utilities Company (Gulf States) subcontracting plan which was accepted and approved by our agency on June 22, 1981. Gulf States has authorized the distribution of their plan to the utility industry as a sample plan. The Gulf States plan may serve as a guide in developing a similar plan for Baltimore Gas and Electric Company.

My staff is available to assist whomever has been designated by your company to prepare and administer the plan.

If this matter can be expedited by our contacting other members of Baltimore Gas and Electric Company management, please suggest who we might contact to resolve this issue.

Sincerely, *


/s/ LARRY L. MOREAU

TUS:Whitehead for KLane:slo:7/23/81

Retyped:erb:7/24/81

cc: O & R Files

TUS, TU, AW 78-8

Doc. 7673A

LARRY L. MOREAU
Director, Public
Utilities Services Division
Office of Public Utilities

Enclosure

BALTIMORE GAS AND ELECTRIC COMPANY A4-78

P. O. BOX 1475

BALTIMORE, MARYLAND 21203

D. PIERRE G. CAMERON, JR.
 ASSOCIATE GENERAL COUNSEL
 201-234-5699

July 28, 1978

Louis G. Ferrand, Jr., Esq.
 Counsel for Civil Rights
 Office of the Solicitor
 U. S. Department of Labor
 Washington, D. C. 20210

Dear Mr. Ferrand:

This is with reference to your letter of June 26, 1978, and its reiteration of a request, initially made at the meeting held on June 21, 1978, that Baltimore Gas and Electric Company furnish to your office a detailed written exposition of its concerns with certain provisions contained in the Supplemental Provisions (Utility Service Contract) of the General Services Administration (GSA Form 1685), proposed to be made a part of a pending Areawide Contract between this Company and the General Services Administration pursuant to which electric, gas and steam service would be provided by this Company to those Federal government facilities covered by the proposed contractual arrangement.

At the June 21, 1978 meeting, as has been done on previous occasions too numerous to list individually, this Company verbally, through its counsel, reiterated its position that it did not intend to act as the enforcement or "policing" agent for the contracting agency pursuant to paragraph 3(g) of GSA Form 1685, as it relates to Executive Order No. 11246, or for the Director, Office of Federal Contract compliance pursuant to paragraph 11(m) of said GSA Form 1685, as it relates to Vietnam Era Veterans Readjustment Assistance Act, and paragraph 16(f) of said GSA Form 1685, as it relates to Section 502 of the Rehabilitation Act of 1973. At issue in each of these paragraphs is similar language which would require the company to take "such action as . . . may direct to enforce such provisions, including sanctions for noncompliance." The Company has repeatedly requested, and that request is hereby renewed, that GSA or the individual contracting agency, as the case may be, with respect to Executive Order No. 11246, and now the Director, Office of Federal Contract Compliance Programs (OFCCP) with respect to the Readjustment Assistance and Rehabilitation Acts, explain, in detail, what enforcement actions may be directed, what sanctions for noncompliance are contemplated and how such sanctions may be implemented, etc. It is submitted that the party proposing specific contract language has the burden to explain what that language is intended to mean, particularly when such language imposes obligations to act on the other party. As counsel to the Company, I am unable to recommend execution of an agreement, certain terms of which have not been reasonably explained as to scope and content.

Louis G. Ferrand, Jr., Esq.

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July 28, 1978

Since receipt of your letter, the Company has had the opportunity, to reflect upon the commitment made at the June 21, 1978 meeting by its counsel to articulate these concerns. To accomplish such a task will require a significant degree of speculation, since if OFCCP, GSA or one or more of their designees or successors were to require action "A", the Company's response could be either "X", "Y" or "Z" or a combination thereof. If, on the other hand, action "B" were to be required, then the Company's response could also be "X", "Y" or "Z" or a combination thereof, and so on down through an almost infinite set of requirements, all of which would require responses in large part unique to the specific requirement. Quite obviously, OFCCP, GSA or one or more of their designees or successors would then be in a position to "pick and choose" among the various requirements the Company's response to which it would then be committed. How then can the Company realistically respond to the June 21 commitment, particularly since GSA and now OFCCP appear unwilling to provide any explanation of intention, when such explanation would clearly provide some basis for response?

Lest there be any misunderstanding with respect to the Company's sense of responsibility toward compliance with national equal employment opportunity policies, the Company has, for a number of years commencing in 1971 with its initiation for the technical assistance of the Equal Employment Opportunity Commission (EEOC) through a thorough investigation culminating in an entirely voluntary agreement with the EEOC, GSA and the Wage and Hour Division of the Department of Labor in July 1976, attempted to comply with both the spirit and the letter of the vast array of equal employment opportunity legislation and regulations relating to race, sex, religion, natural origin, age, handicap or veteran status as employment criteria. These commitments are to continue undiminished whether or not an Areawide Contract with the GSA is finally consummated on mutually acceptable terms and conditions. The Company, for its own part, does not require further specific contractual commitments to assure its continued compliance with such laws, rules and regulations as they apply to its own activities.

As a part of any enforcement activity or sanction for noncompliance, the Company cannot agree, at the direction of GSA, OFCCP or any one or more of their designees or successors, to institute suit or other process against a subcontractor or vendor with which the Company is not in privity of contract, of which the Company otherwise has no direct knowledge, and which is not amenable to suit and the service of process within the State of Maryland. Furthermore, the Company cannot agree to be joined, without its express written consent as a third party plaintiff or counter-claimant against any subcontractor or vendor, in any suit or process instituted by GSA, OFCCP, or any one or more of their designees or successors.

In the event that any subcontractor or vendor of which the Company has direct knowledge, whether or not in privity of contract with the Company, is determined by GSA, OFCCP or any one or more of their designees or successors, as an enforcement agency under the proposed Areawide Contract, to have violated the provisions of any law or pertinent regulation or rule with respect to Executive Order No. 11246, or the Readjustment Assistance and Rehabilitation Acts, the Company would, at the reasonable request of GSA, OFCCP, or any such designee or successor, use its best efforts to forward by certified mail to such designated subcontractor or vendor appropriate notice of such alleged violation in the form provided by GSA, OFCCP, or such designee or successor, and to act thereafter as a conduit for the transmission of additional notices to such designated subcontractor or vendor. Under certain circumstances, the foregoing undertaking could be expanded to include direct telephone contact with such subcontractor or vendor to assure that appropriate notice

Louis G. Ferrand, Jr., Esq.

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July 28, 1978

of any alleged violations was timely received. The Company would not in any such circumstances assume the role of mediator or counselor for such subcontractor or vendor and GSA, OFCCP or any of their designees or successors, nor would it act as a conduit for return communications from such subcontractor or vendor to the GSA, OFCCP or such designee or successor as originator of such notices.

As was pointed out during the course of the June 21, 1978 meeting, one of the principal concerns of the Company with respect to GSA Form 1685 and its predecessors rests in the broad definitions employed for the terms "subcontracts" and "purchase orders". A subcontract or purchase order issued as an integral part of the provision of the electric, gas or steam service contemplated by an Areawide Contract should, it is submitted, be differentiated from a subcontract or purchase order only tangentially related to such service. For example, subcontracts or purchase orders issued for fuel, power plant spare parts, transmission lines, distribution mains, etc., can be clearly classified as an integral part of the provision of such services. On the other hand, subcontracts or purchase orders for office supplies, cafeteria services, merchandise activities, automated invoicing and bill payment equipment, etc., are examples of subcontracts or purchase orders only tangentially related to the provision of service under an Areawide Contract. An explicit definition of pertinent subcontracts and purchase orders would go far to resolve uncertainties in the applicability of the provisions of GSA Form 1685 in the context of the provision of utility services.

While the foregoing is not a complete analysis of the concerns of the Company, it is submitted that your office can now begin in turn its analysis of these concerns and hopefully initiate preparation of the long-sought explanation of the enforcement and compliance sanction language of GSA Form 1685. It is likewise the sincere hope of the Company that these matters can in fact be resolved without resort to legal action.

Very truly yours,

D. Pierre G. Cameron, Jr.

DPGC:nmo

cc: Albert A. Viechiolla, Esq.
Leonard Lowentritt, Esq.
Ms. Sylvia P. Tompkins ✓

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SEP 23 1980

Mr. Joseph A. Schulz
Legal Department
Baltimore Gas and Electric Company
Charles Center
P. O. Box 1473
Baltimore, MD 21203

Dear Mr. Schulz:

We have reviewed your comments and proposed changes to our Draft No. 1 of the proposed areawide public utility contract between Baltimore Gas and Electric Company and the General Services Administration, on behalf of all Federal agencies.

We accept all of your proposed changes to the body of the contract, except as stated below, and have enclosed four copies of Draft No. 2 for your review and approval. We incorporated your suggested wording or the intent of your suggestions, using modified wording where necessary. Along with these changes, we have added administrative changes as required. We are however, unable to change the supplementary clauses since they are outside the jurisdiction of this office. We regret that we are unable to negotiate and change the required clauses and we feel constrained in a similar manner as your company since it is unable to negotiate its rates and terms and conditions of service with its customers because of state regulation. We view the areawide contract concept as a common ground to allow both parties to do business with each other while being subject to our respective statutes and regulations.

Since our initial draft of the proposed contract, several new clauses have been added to our list of required clauses in accordance with Federal law. These clauses are referenced in our new GSA Form 1685-A hereby incorporated into and made part of the contract. The former Articles 7(c) and 12 have been deleted since they are covered in GSA Form 1685-A.

Said Form 1685-A, among other changes, contains a new Disputes clause, the Certification-Wage and Price Standards clause, Small Business, two Woman-Owned Business Concerns Subcontracting Program and the Subcontracting Plan.

The Subcontract Plan is required to implement Section 211 of Public Law 95-507 (Amendment to the Small Business Act (Act)) for contracts exceeding \$500,000 which was newly enacted by Congress. The Woman-Owned Business Concerns Subcontracting Program is to implement the Utilization of Woman-Owned Business Concerns, but does not require the submission of a Subcontracting Plan.

We are enclosing additional information which may assist you in preparing a Subcontracting Plan and in clarifying the requirements of Section 211 of Public Law 93-507 along with a Subcontracting Plan format which can be filled-in and returned to this office. Once we receive your Subcontracting Plan, we will review it for consistency with policy contained in the Act and if it is approved, we will incorporate the plan by reference in the proposed areawide contract.

The above changes brings the areawide contract up-to-date. We hope this contract will meet with your approval. We look forward to your reply and completion of the contract. Please contact me or Mrs. Kathleen Lane, of my staff, on (202) 273-3889 if you have any questions.

Sincerely,

John
9-23-80
LARRY L. MOREAU
Director, Public
Utilities Services Division
Office of Public Utilities

Enclosures

cc:

Mr. Raymond C. Bryant-BG&E

Concurrence: /s/ Lennard Loewentritt for Albert Vicchiolla 9/22/80
LF2 Date

TUS:ELane:erb:9/2/80:

cc: O & R Fields

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2

We are enclosing additional information which may assist you in preparing a Subcontracting Plan and in clarifying the requirements of Section 211 of Public Law 93-507 along with a Subcontracting Plan format which can be filled-in and returned to this office. Once we receive your Subcontracting Plan, we will review it for consistency with policy contained in the Act and if it is approved, we will incorporate the plan by reference in the proposed areawide contract.

The above changes brings the areawide contract up-to-date. We hope this contract will meet with your approval ~~and we apologize for the inconvenience~~ ~~these needed revisions cause you and your staff.~~ We look forward to your reply and completion of the contract. Please contact me or Mrs. Kathleen Lane, of my staff, on (202) 275-5009 if you have any questions.

Sincerely,

LARRY L. MOREAU
Director, Public
Utilities Services Division
Office of Public Utilities

Enclosures

EC1

Mr. Raymond C. Bryant-BG&E

Concurrence:

[Signature]
for *[Signature]* 9/22/80
LFZ Date

TUS:KLane:erb:9/2/80:

cc: O & R Fiels

TUS, TU

AW 78-8

Document 6455A Disk 29A

GAO

United States General Accounting Office

Report to the Chairman, Committee on
Small Business, House of Representatives

May 1988

PROCUREMENT

Compliance With Subcontracting Requirements at GSA, Energy, and Navy



GAO/GGD-88-83



United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-229245

May 24, 1988

The Honorable John J. LaFalce
Chairman, Committee on Small Business
House of Representatives

Dear Mr. Chairman:

As requested by the former Committee Chairman, we have reviewed the compliance of the General Services Administration (GSA) and the Departments of Energy and the Navy with certain statutory requirements for subcontracting with small and small disadvantaged businesses.

On November 10, 1987, we briefed the Committee on the results of our review. Subsequently, the Committee requested that we summarize and formally transmit the information presented at the briefing. In this report we transmit that data supplemented by a brief discussion of the major points and comments from the three agencies on our findings.

Section 211 of Public Law 95-507, enacted on October 24, 1978, requires that with certain exceptions contracts and contract modifications awarded by federal agencies that exceed \$500,000, or \$1 million in the case of construction contracts, contain a subcontracting plan providing for the maximum practicable utilization of small and small disadvantaged businesses.

As agreed with the Committee, the objective of our work was to provide information on the extent to which GSA, Energy, and the Navy have complied with the subcontracting requirements for the Committee's use in assessing these agencies' overall compliance with and administration of the requirements. To accomplish our objective, we determined if subcontracting plans were included in contracts if required, what goals were set for participation of small and small disadvantaged businesses, and whether these goals were being achieved. We also determined the extent to which the agencies use techniques such as incentive clauses and remedial actions to promote the use of small and small disadvantaged businesses. We reviewed 2,062 individual contract files at 15 procurement offices in 5 locations. A detailed explanation of the scope and methodology of our work is given in appendix I.

Results in Brief

About 50 percent of the 2,062 contracts in our sample contained the required subcontracting plans. We found that overall about 11 percent

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of the 1,008 contracts and contract modifications that did not have subcontracting plans should have had one. These consisted of 11 of 503 contract actions at GSA, 15 of 233 at Energy, and 84 of 272 at Navy. We found that about 89 percent of the contracts and contract modifications that did not have plans had reasons that were justified.

Requirements for Subcontracting Plan

According to the Federal Acquisition Regulation, contracting officers are ultimately responsible for ensuring that a subcontracting plan, when required, is submitted by the prime contractor and made a material part of the contract. Most of the instances at Energy and all of those at GSA where contracts or modifications should have had plans but did not were attributed by agency officials to a mistaken interpretation of the regulations. In addition, Energy officials attributed several instances to oversight. At the Navy, officials told us all of the instances were the result of oversight. Appendix I contains a detailed explanation of the contracts we reviewed that did not have a subcontracting plan and the reasons why.

Subcontracting Goals

Each plan must contain separate goals for the participation of small and small disadvantaged businesses in the subcontracting to be done under the contract. During our review of those contracts containing subcontracting plans, we collected data on each plan's subcontracting goals along with other information pertaining to the plan. Highlights of the data we collected are contained in appendix I.

According to the Federal Acquisition Regulation, the adequacy of each subcontracting goal should be individually assessed by appropriate agency officials on the basis of a number of factors, such as the opportunity for subcontracting in the prime contract, the potential small and small disadvantaged businesses that could participate, and the extent of subcontracting in similar contracts in the past. Because there are no quantitative criteria for evaluating subcontracting goals, either in law or regulation, a meaningful comparison of goals is not possible. Moreover, it is not feasible to compare one agency's goals to another's, even if it were possible to compare goals for individual plans, because data are often inconsistent.

During our review, we attempted to determine how successful contractors are in achieving the goals contained in the subcontracting plans. Although the available data permitted only a limited analysis on an

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aggregate basis, it appears that in general, most of the subcontracting goals at the three agencies we reviewed are being achieved.

Remedial Actions and Incentive Clauses

We also inquired into the use of remedial actions by GSA, Energy, and the Navy against contractors when subcontracting goals were not achieved. Agency officials could not recall any instance of such actions ever having been taken.

Finally, we reviewed the use of incentive clauses by GSA, Energy, and the Navy as a means of increasing subcontracting opportunities for small and small disadvantaged businesses. We were told that such incentive clauses are never used at GSA and only very rarely at Energy. Navy records indicated that incentive clauses were used in some cases at one of the three commands we visited.

Agency Comments and Our Evaluation

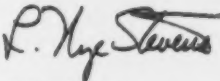
A draft of this report was provided to GSA, Energy, and the Department of Defense for comment. The Office of the Secretary of Defense provided oral comments and said it fully concurred with our observations. GSA's comments, included as appendix II, concerned contracts that did not contain subcontracting plans due to erroneous calculation of contract dollar values. GSA said it became aware of this problem just before our study and has initiated corrective action. Energy described the draft report as informative and well-balanced but identified several areas where it thought the report could be improved. The Department's comments, along with our response, are included as appendix III.

As arranged with the Committee, we plan no further distribution of this report until 30 days from the issuance date unless you publicly announce its contents earlier. At that time we will send copies to the Administrator of General Services and the Secretaries of Defense, the

B-229245

Navy, and Energy, and to others upon request. If you have any questions, please contact me on 275-8676 or Michael L. Eid on 557-7944.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "L. Nye Stevens". The signature is fluid and cursive, with the first name "L." and last name "Stevens" clearly distinguishable.

L. Nye Stevens
Associate Director

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GSA	General Services Administration	
OSDBU	Office of Small and Disadvantaged Business Utilization	
NavAir	Naval Air Systems Command	
NavSea	Naval Sea Systems Command	

Appendix I

Compliance With and Administration of Subcontracting Requirements at GSA, Energy, and the Navy

This appendix presents the contents of a briefing given on November 10, 1987, before representatives of the House Committee on Small Business. The work was done in response to a request by the former Committee Chairman that we review the compliance of the General Services Administration (GSA) and the Departments of Energy and the Navy with certain statutory requirements for subcontracting with small and small disadvantaged businesses.

Background

Section 211 of Public Law 95-507 requires that federal contracts and contract modifications exceeding \$500,000, or \$1 million in the case of construction contracts, contain a subcontracting plan providing for the maximum practicable utilization of small and small disadvantaged businesses.

For negotiated contracts, the apparently successful offeror must submit an acceptable subcontracting plan before the contract is awarded. If the offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror is ineligible for the award. For sealed bid acquisitions that meet the dollar threshold, the successful bidder awarded the contract must submit an acceptable plan within the time limit prescribed by the contracting officer.

Subcontracting plans are not required for contracts

- with small business concerns,
- for personal services,
- to be performed entirely outside the United States, and
- where the contracting officer certifies that no subcontracting opportunities exist.

Each subcontracting plan must include

- separate percentage goals for using small and small disadvantaged businesses as subcontractors;
- the name of an individual employed by the offeror who will administer the offeror's subcontracting program and a description of the individual's duties;
- a description of the efforts the offeror will make to ensure that small and small disadvantaged business concerns will have an equitable opportunity to compete for subcontracts;

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Energy, and the Navy

- assurances that the offeror will require all subcontractors (except small businesses) that receive awards in excess of \$500,000 (\$1 million for construction subcontracts) to also prepare and implement a subcontracting plan; and
- a description of the types of records the offeror will maintain to demonstrate compliance with the requirements and goals in the plan.

Public Law 95-507 also requires each federal agency with procurement authority to establish an Office of Small and Disadvantaged Business Utilization (OSDBU) that is responsible for, among other things, implementing the subcontracting program within the agency. GSA, Energy, and the Navy have also established positions for Small Business Specialists who, besides implementing OSDBU's policies and programs at the local level, review and approve proposed subcontracting plans. The contracting officer making the procurement, however, is ultimately responsible for ensuring that subcontracting plans are prepared and submitted when required and made a material part of the contract or modification.

The Small Business Administration has also been given the responsibility by the Office of Management and Budget to review all subcontracting plans in an advisory capacity. Monitoring the contractor's performance of the subcontracting plan after the contract has been awarded is the responsibility of the contracting officer who is administering the contract. This individual may or may not be the same person responsible for the procurement. Section 211 of Public Law 95-507 specifies that failure to comply in good faith with the requirements of the subcontracting plan can be considered a material breach of contract.

Objective, Scope, and Methodology

As agreed with the House Small Business Committee, the objective of our work was to provide information the Committee desired to assess how well GSA, Energy, and the Navy are complying with and administering the subcontracting provisions contained in section 211 of Public Law 95-507.

To accomplish our objective, we reviewed 2,052 contract files at 15 procurement offices in the Washington, D.C., and San Francisco metropolitan areas and in Chicago, New York City, and Oak Ridge, Tennessee. Table I.1 lists the procurement offices we visited and shows the number of contracts reviewed at each location.

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**Table I.1: Procurement Offices Visited
 and Contracts Reviewed**

Procurement office	Contracts reviewed		
	With plans	Without plans	Total
GSA			
Tools	33	69	102
Automotive	64	17	81
Furniture	55	85	140
Office supplies	95	148	243
Office equipment	60	30	90
Special programs	5	7	12
Scientific equipment	21	27	48
ADP	132	120	252
Totals	465	503	968
Energy			
Washington, D.C.	34	21	55
Chicago	88	116	204
San Francisco	56	30	86
Oak Ridge, TN	46	66	112
Totals	224	233	457
Navy			
NavAir	116	100	216
NavSea	151	145	296
Strategic Systems Project Office	88	27	115
Totals	355	272	627
Totals	1,044	1,008	2,052

For those contracts with a subcontracting plan, we recorded data concerning various aspects of the plan. For those contracts without a plan, we reviewed contract files and talked with responsible procurement personnel to determine why there was no plan and determined if the reason was valid and properly documented.

We also looked at (1) the size of the subcontracting goals in terms of dollars and as a percentage of total subcontracting to be done under the contract, (2) the extent to which subcontracting goals were being achieved, (3) remedial actions taken for substantial nonperformance of subcontracting plans, and (4) the use of incentive clauses to increase

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subcontracting opportunities for small and small disadvantaged businesses.

Our sampling methodology varied according to the type of procurement activity at each of the three agencies we reviewed. Contracts at the Department of Energy are normally for very long periods of time and most procurement actions consist of modifications to existing contracts rather than new awards. To assure adequate audit coverage, we identified all contracts that were open during fiscal year 1986 that had a total face value of \$500,000 or more.¹ We visited 4 of Energy's 15 procurement offices—the 3 with the most open contracts and the Washington, D.C., office—and reviewed 61 percent of all open contracts with a face value of \$500,000 or more. For each contract we reviewed, we examined the most recent action for \$500,000 or more—either the basic award or a contract modification—that was completed before October 1, 1986.

Almost all procurement actions at GSA are contract awards rather than contract modifications. In addition, there are a number of multiyear contracts that last from 2 to 3 years. To maximize our audit coverage under these conditions, we identified all contracts for \$500,000 or more that were awarded in the 18-month period ending in March 1987 and visited the eight GSA procurement offices that had awarded almost two-thirds of these contracts.

In general, the Navy's procurement actions are a mixture of awards and contract modifications. Moreover, the Navy's procurement offices are much more numerous and widespread than those of Energy and GSA. We selected for review the three offices that had the largest dollar volume of procurement actions during fiscal year 1986. In all, these three offices accounted for 53 percent of all Navy procurement dollars during that period. At each of these locations, we identified all open contracts that had a total face value of \$500,000 or more and reviewed the most recent action on each contract—either award or modification—completed during fiscal year 1986 that met the dollar criteria. In some cases we reviewed a representative sample of contract actions.

We did our work from October 1986 to October 1987 in accordance with generally accepted government auditing standards.

¹ Although the law specifies contracts over \$500,000, we chose to examine contracts for \$500,000 or more when we learned that some contracts for exactly \$500,000 had subcontracting plans prepared for them.

Compliance With Subcontracting Provisions

Approximately half of the contracts and contract modifications we examined did not have subcontracting plans. In most instances, the reasons given for a procurement not having a plan were justified. While each agency had a number of unjustified reasons, the Navy had the most instances where procurements that should have had subcontracting plans did not.

GSA

The number of contracts we reviewed at GSA that did not have subcontracting plans is shown in table I.2 along with the reasons cited for the contracts not having a plan. The majority of these contracts—over 80 percent—were awarded to small businesses and thus did not require a subcontracting plan. Almost 15 percent were purchases from mandatory sources, such as Federal Prison Industries and workshops of the National Industries of the Blind. GSA does not consider these to be actual contracts but treats them as such to facilitate handling.² Consequently, GSA believes they are also exempt from the requirement for subcontracting plans. While most of the other reasons cited were justified, we identified 11 contracts that did not have a valid reason. These were multiyear contracts with a total face value exceeding the dollar threshold but for which the contracting officer had applied the dollar criteria on an annual basis. For example, the contracting officer determined that a 3-year contract with a total value of \$1.2 million did not require a plan since the annual value was only \$400,000 a year. Because the dollar threshold applies to the total value of a contract and not the value computed on an annual basis, all of these contracts should have had plans submitted by the contractors.

²GAO is currently reviewing the question of whether these purchases are contracts subject to the requirements of section 211 of Public Law 96-507. We will relay under separate cover our position on this issue to GSA.

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Compliance With and Administration of
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Table I.2: GSA Contracts, \$500,000 or
Greater, Without Subcontracting Plans

Office	Contracts without plans	Reasons cited for no plan	
		Justified	Not justified
Tools	69	67 Small business 2 Mandatory source	
Automotive	17	15 Small business 1 No opportunities 1 Original award below threshold	
Furniture	85	67 Small business 1 No opportunities 13 Mandatory source 1 \$500,000 exactly	3 Contract value put on annual basis
Office supplies	148	93 Small business 53 Mandatory source 2 Original award below threshold	
Office equipment	30	22 Small business 1 Outside U.S.	7 Contract value put on annual basis
Special programs	7	5 Small business 1 Mandatory source 1 Outside U.S.	
Scientific equipment	27	26 Small business	1 Contract value put on annual basis
ADP	120	118 Small business 2 No opportunities	
Totals	503	413 Small business 69 Mandatory source 4 No opportunities 3 Original award below threshold 2 Outside U.S. 1 \$500,000 exactly	11 Contract value put on annual basis

Department of Energy

Table I.3 illustrates that very few of the contract awards and modifications without plans at the Department of Energy had been awarded to small businesses. Approximately two-thirds were situations where the initial award was either below the dollar threshold or was made before the act was implemented. Subsequent modifications to these contracts were each below the dollar threshold so that although each contract had a total face value exceeding \$500,000, none had a plan because no individual action for the contract exceeded the dollar threshold.

While most of the remaining contract actions had valid reasons for not having a subcontracting plan, we identified 15 at two Energy locations that did not have plans when they should have. Agency officials told us that nine of these cases were the result of oversight. The remaining six

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Energy, and the Navy

were cases similar to those found at GSA where multiyear contracts or modifications had been awarded but the contracting officer had applied the criteria on an annual basis.

Department of the Navy

Table I.4 summarizes the procurement actions we reviewed at the Navy that did not have subcontracting plans. Similar to GSA, the most frequently cited reason for a contract action not having a subcontracting plan was that the award was made to a small business. However, 84 of the 272 actions we reviewed, or 31 percent, should have had subcontracting plans but did not. In all 84 cases, the reason given by Navy officials for failing to obtain a subcontracting plan was oversight.

Table I.3: Department of Energy
Procurement Actions, \$500,000 or More,
Without Subcontracting Plans

Office	Contracts without plans	Reasons cited for no plan	
		Justified	Not justified
Washington, D.C.	21	1 Small business 16 No opportunities 1 Outside U.S. 3 Original award below threshold	
Chicago	116	11 No opportunities 67 Awarded prior to act 8 Plan expired 30 Original award below threshold	
Oak Ridge, TN	66	2 Small business 4 No opportunities 7 Plan expired 6 Awarded prior to act 1 \$500,000 exactly 36 Original award below threshold	4 Overlooked 6 Contract value put on annual basis
San Francisco	30	1 Small business 9 No opportunities 9 Awarded prior to act 6 Original award below threshold	5 Overlooked
Totals	233	4 Small business 82 Awarded prior to act 40 No opportunities 75 Original award below threshold 1 Outside U.S. 1 \$500,000 exactly 15 Plan expired	6 Contract value put on annual basis 9 Overlooked

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Compliance With and Administration of
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Table I.4: Department of the Navy
Procurement Actions, \$500,000 or More,
Without Subcontracting Plans

Office	Contracts without plans	Reasons cited for no plan	
		Justified	Not justified
NavAir	100	27 Small business 13 Outside U.S. 6 No opportunities 1 Personal services 1 Work transferred	52 Overlooked
NavSea	145	85 Small business 16 No opportunities 3 Outside U.S. 1 Original award below threshold 10 Intra-Navy contract	30 Overlooked
Strategic Systems Project Office	27	3 Small business 19 No opportunities 3 Personal services	2 Overlooked
Totals	272	115 Small business 41 No opportunities 16 Outside U.S. 4 Personal services 1 Original award below threshold 10 Intra-Navy contract 1 Work transferred	84 Overlooked

Subcontracting Goals
for Small and Small
Disadvantaged
Businesses

Slightly more than half of the contract awards and modifications we examined had subcontracting plans. These plans contained goals for the use of small and small disadvantaged businesses as subcontractors, which were expressed as a percentage of the total amount of subcontracting to be done under the action. Selected statistics for the small business and small disadvantaged business goals we reviewed are presented in tables I.5 and I.6. There are differences in data among the agencies and a lack of quantitative standards for subcontracting goals. For these reasons, we do not believe that these statistics should be used as a means of comparing the subcontracting goals of one agency to another, nor do we think it is feasible to compare the goals of any one plan to that of another.

In some cases, not all of the subcontracting data from a plan were available. We excluded these cases when we calculated the statistics on subcontracting goals. We excluded most of GSA's subcontracting plans when we calculated that agency's averages for another reason. Firms selling commercial products to the government are authorized to prepare "companywide" subcontracting plans. These plans show goals and amounts

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to be subcontracted for the entire company and apply to all federal contracts awarded the company during the period covered by the plan. Because GSA purchases so many commercial products, 80 percent of the subcontracting plans we reviewed at that agency were companywide plans. Including data from companywide plans in calculating GSA averages would not present a representative picture of that agency's subcontracting program since none of the data relate specifically to contracts awarded by the agency. Consequently, companywide subcontracting plans were not included when we calculated statistics on GSA's subcontracting goals.

In addition to the difficulties in collecting comparable data among agencies, an even more basic difficulty in trying to compare any one plan to another is the absence of quantitative criteria for assessing the reasonableness of subcontracting goals. In general, goals are evaluated individually using subjective standards based upon knowledge and experience. Contracting officers, SBA representatives, and the agency's Small Business Specialists consider, for example, the opportunity for subcontracting in the prime contract, potential small and disadvantaged businesses that could participate in the contract, and the amount of subcontracting in similar contracts in the past. In our opinion, the variability of these standards does not make it feasible to compare one plan's subcontracting goals to those of another plan.

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Table I.5: Small Business Subcontracting
Goals

Agency/location	Plans reviewed	No. of plans used in goal computations ^a	Goals ^b		
			Mean (%)	Median (%)	Range (%)
Navy					
NavAir	116	108	38	36	0-100
NavSea	151	135	43	40	0-100
Strategic Systems Project Office	88	84	38	36	0-100
Overall	355	327	40	37	0-100
Energy					
Washington, D.C.	34	29	56	59	05-100
Chicago	88	88	32	29	4-100
San Francisco	56	50	40	40	0-100
Oak Ridge, TN	46	40	42	40	2-100
Overall	224	207	39	38	0-100
GSA					
Tools	33	6	59	45	34-100
Automotive	64	1	38	38	38
Furniture	55	4	22	22	3-43
Office supplies	95	77	21	8	0-100
Office equipment	60	1	10	10	10
Special programs	5	1	49	49	49
Scientific equipment	21	1	3	3	3
ADP	132	0	0	0	0
Overall	465	91	23	12	0-100

^aPlans with incomplete data on subcontracting goals were excluded when calculating statistics. Companywide plans were also excluded from calculations.

^bGoals are expressed as the percentage of total subcontracting under a contract to be awarded to small businesses.

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Table I.6: Small Disadvantaged Business
Subcontracting Goals

Agency/location	Plans reviewed	No. of plans used in goal computations ^a	Goals ^b		
			Mean (%)	Median (%)	Range (%)
Navy					
NavAir	116	108	1	1	0-13
NavSea	151	135	4	1	0-68
Strategic Systems Project Office	88	84	3	1	0-100
Overall	355	327	3	1	0-100
Energy					
Washington, D.C.	34	22	14	5	0-89
Chicago	88	88	3	2	0-26
San Francisco	56	50	7	2	0-56
Oak Ridge, TN	46	40	11	5	0-70
Overall	224	200	7	3	0-89
GSA					
Tools	33	6	14	3	4-50
Automotive	64	1	4	4	4
Furniture	55	4	6	6	1-10
Office supplies	95	77	1	2	0-7
Office equipment	60	1	1	1	1
Special programs	5	1	3	3	3
Scientific equipment	21	1	1	1	1
ADP	132	0	0	0	0
Overall	465	91	2	1	0-50

^aPlans with incomplete data on subcontracting goals were excluded when calculating statistics. Companywide plans were also excluded from calculations.

^bGoals are expressed as the percentage of total subcontracting under a contract to be awarded to small disadvantaged businesses.

Success in Achieving Subcontracting Goals

During our review we attempted to determine to what extent subcontracting goals were being achieved at GSA, Energy, and the Navy. Although we were unable to obtain a uniform measurement among the three agencies because of different recordkeeping practices, we obtained some broad indications that most subcontracting goals are being achieved.

Companies with contracts that have subcontracting plans are required to report the progress made against subcontracting goals. Two reports

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are prepared: one for each individual contract and another for all contracts the company has with any particular agency. At the three agencies we visited, the reports on individual contracts are sent to the contracting officer administering the contract. Because these reports are widely dispersed across the country and are very difficult to obtain, we chose not to use them in our review.

The reports measuring companywide performance are submitted to OSD/BU at GSA, Energy, and the Navy and thus are available at a centralized location. Even so, the value of these reports in measuring performance is somewhat limited, and the way they are summarized and reported differs among the three agencies.

The Navy receives companywide performance reports only for those contracts it administers. Most Navy contracts are in fact administered by the Defense Logistics Agency. In fiscal year 1986, the Navy was administering 1,916 contracts with subcontracting plans that had been awarded to 86 companies. Of these contracts, 131 were completed during this period. Of the completed contracts, 110 had met or exceeded the subcontracting goal for small businesses and achieved, on average, 139.8 percent of the goal. Eighty had met or exceeded the goal for small disadvantaged businesses and achieved, on average, 157.6 percent of the goal.

Twenty-one of the completed contracts did not meet the small business goal, achieving, on average, 34.1 percent of the goal. Similarly, 44 contracts did not meet the small disadvantaged goal, achieving an average of 29.6 percent. Seven of the completed contracts did not have small disadvantaged goals in their subcontracting plans.

Although the Department of Energy does have centralized reports on the performance of contractors for subcontracting goals, these reports are limited to contracts that are still open. To obtain an accurate and complete measure of performance against goals, we believe it would be necessary to review plans for completed contracts.

Energy does have some data available to measure the percentage of subcontracted dollars that went to small and small disadvantaged businesses. In fiscal year 1986, the total dollar amount of subcontracts reported by prime contractors was \$4.7 billion. Of this, approximately half went to small businesses, and slightly more than 5 percent went to small disadvantaged businesses. What the aggregate goals were for that period, however, is unknown because Energy does not keep that data.

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Data at GSA are also limited because only data on the aggregate goals and total performance against those goals are available. In fiscal year 1986, the aggregate GSA small business and small disadvantaged business goals were \$212.5 million and \$12.8 million, respectively. This represented 25 percent of all subcontracted dollars for small businesses and 1.5 percent of all subcontracted dollars for small disadvantaged businesses. The actual performance of all contractors for that period saw 32.6 percent of total subcontracted dollars going to small businesses and 1.8 percent going to small disadvantaged businesses.

Although we could not measure the performance of individual contractors because data are not available, on an aggregate basis GSA exceeded both subcontracting goals for fiscal year 1986.

Use of Incentive Clauses and Remedial Actions

Section 211 of Public Law 95-507 also authorized federal agencies to include incentive clauses in negotiated contracts as a means of encouraging subcontracting opportunities for small and small disadvantaged businesses.

Although records are not kept on the use of such clauses at GSA and Energy, we were informed by officials of those agencies that the clause is never used at GSA and only very rarely used at Energy.

The Navy does keep records of the use of incentive clauses and we found that at least at one of the commands we visited, these clauses are used to some extent. Out of 411 active contracts that were identified at NavSea, Navy records indicated that 30 used incentive clauses. We found no evidence that incentive clauses were used at the other two commands we visited.

Finally, we asked GSA, Energy, and Navy officials whether punitive or remedial actions had been taken against any contractor for failing to meet a subcontracting goal without having demonstrated a good faith effort to do so. We were informed by officials at each agency that to the best of their knowledge, such actions have never been taken.

Appendix II

Comments From the General Services Administration



General Services Administration
Washington, DC 20405

March 31, 1988

Dear Mr. Fogel:

Thank you for the opportunity to review draft GAO Audit Report #GAO26/GGD-88-.

Our only comment concerns the Federal Supply Service multiyear contracts which did not contain subcontracting plans due to erroneous calculation of the contract dollar values. We have been informed by the Federal Supply Service (FSS) that they became aware of this problem just prior to the study, and that the correct application of contract dollar values in determining whether or not a plan is required has been called to the attention of the supervisors.

We have also been informed that the FSS Procurement Management Division is preparing a notice to all FSS contracting activities on this subject. We will forward a copy to you upon receipt.

In addition, we will request the Office of Acquisition Policy to include an article in the GSA Acquisition News on the correct method of calculating multiyear contract dollar values with regard to subcontracting plans.

Sincerely,

JOHN F. WYNN, JR.
Director
Office of Small and Disadvantaged
Business Utilization

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
United States General Accounting Office
Washington, DC 20548

Appendix III

Comments From the Department of Energy



Department of Energy
Washington, DC 20585

April 6, 1986

Mr. J. Dexter Peach
Assistant Comptroller General
Resources, Community, and
Economic Development Division
U.S. General Accounting Office
Washington, D.C. 20548

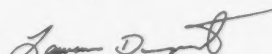
Dear Mr. Peach:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled "Procurement: Compliance with Subcontracting Requirements at GSA, Energy, and Navy."

This report contains no recommendations. We have found it informative and well balanced in its presentation. We, however, have identified four areas in which we believe the report could be meaningfully improved. Those detailed comments are enclosed.

The DOE hopes that these comments will be helpful to the GAO in its preparation of the final report.

Sincerely,


Lawrence F. Davenport
Assistant Secretary
Management and Administration

Enclosure



Celebrating the U.S. Constitution Bicentennial — 1787-1987

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Comments From the Department of Energy

Now on p. 2

Now on p. 15

Now on pp. 17 and 18

See GAO comment 1

See GAO comment 2

See GAO comment 3

Now on p. 3

Now on p. 20

See GAO comment 4

Department of Energy Comments on the GAO Draft Report
"Procurement: Compliance with Subcontracting Requirements
at GSA, Energy and Navy" (GAO/GGD-88-)

1. Page 4 - "According to the Federal Acquisition Regulations, the adequacy of each subcontracting goal should be individually assessed ..."

Page 21- "[W]e do not believe that these statistics should be used as a means of comparing subcontracting goals of one agency to another nor do we think it is feasible to compare the goals of any one plan to that of another."

Comment- In light of these two quotations and other material on pages 4, 21 and 24 and the notes on pages 22 and 23, the draft report makes it clear that comparisons of subcontracting plan goals from one contract to another, let alone the comparison of summary data from one agency to another, result in no valid conclusions.

For these reasons we believe that the three goals columns on pages 22 and 23 should be deleted. The information in the third goals column is not subheaded, making its value even more questionable.

In our opinion the most relevant data that could be presented in this context are (1) cases in which individual goals were not achieved so as to suggest a less than good faith effort on the part of the contractor; and (2) instances, in GAO's opinion, in which plans did not reflect all expected subcontracting opportunities.

2. Page 5 - "We also inquired into the use of remedial actions by GSA, Energy, and the Navy against contractors when subcontracting goals were not achieved."

Page 28- "[W]e asked GSA, Energy, and Navy officials whether punitive or remedial actions had been taken against any contractor for failing to substantially meet a subcontracting goal."

Comment- We believe that the report should make it clear that a goal is just that, a target that one expects to achieve with good faith effort. One consideration in establishing meaningful goals is that achievement is not certain. We believe that the report should note that a mere failure to achieve a goal is not a basis for "remedial action," e.g., termination for default. The Department of Energy believes that the basis for such dramatic remedial action as termination for default is conduct on the

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See GAO comment 5

See GAO comment 6
Now on p. 3
Now on p. 20

Now on p. 3

Now on p. 20

See GAO comment 7

Now on p. 16

See GAO comment 8
Now on pp. 2 and 16

part of the contractor that demonstrates bad faith in failing to achieve its goals.

Furthermore, we believe that to put the statement that "[a]gency officials could not recall any instance of such action ever having been taken" in proper context, the report should note whether, during the course of its review, GAO found instances that it believes warrant remedial action.

Also, we believe the heading of the portion of the report on page 5 is misleading. That heading should more closely parallel the related heading on page 28 by mentioning "remedial actions."

3. Page 5 - "Finally, we reviewed the use of incentive clauses by GSA, Energy and Navy as a means of increasing subcontracting opportunities for small and small disadvantaged business."

Page 26- "Section 211 of Public Law 95-507 also authorized federal agencies to include incentive clauses in negotiated contracts as a means of encouraging subcontracting opportunities for small and small disadvantaged business."

Comment- We believe the report should note that the use of such incentive provisions in a meaningful way is difficult and can result in the Government's paying incentives when the actual amount of subcontracting with small and small disadvantaged business is not significantly above what it might otherwise have been. Incentive provisions may provide motivation for the proposer to propose low goals or to fail to disclose all subcontracting opportunities. Also, other factors, such as an overrun of a contract, can significantly increase the percentage of a contract's value subcontracted to small or small disadvantaged business without increasing the number of actions or dollars actually subcontracted.

4. Page 24- "[A]n even more basic problem in trying to compare any one plan to another is the absence of quantitative criteria for assessing the reasonableness of subcontracting goals."

Comment- We believe that in this discussion the report should note that, as stated on pages 4 and 21, the goals are to be set on a contract-by-contract basis and would vary even for the same requirement if different contractors were used. The only valid judgment, in our opinion, is whether, on an individual contract basis, individual goals reflect a good faith effort by the contractor to maximize the involvement of small and small disadvantaged businesses in its subcontracting opportunities.

Also, in light of this, perhaps the term "problem" in the above-quoted statement should be replaced with the phrase "reason for not."

The following are GAO's comments on the Department of Energy's letter dated April 6, 1988.

GAO Comments

1. Energy believes that the statistics on subcontracting goals should be deleted in light of statements in our report that conclusions cannot be drawn from them. While we continue to believe that the goal data should not be used for comparative analyses, we also believe the summary tables are needed to meet the objective of our review and provide an overall picture of the subcontracting plans we reviewed.
2. The subheading was placed in the wrong position in the draft report. The error has been corrected.
3. We agree that such information would be helpful to Energy in improving the management of the program. However, as pointed out in the report, data on contractor performance on goals in individual plans are maintained on a decentralized basis and are difficult to obtain. Consequently, we did not include an analysis of this type in the scope of our review. Similarly, to identify plans that did not reflect all expected subcontracting opportunities would require an evaluation of individual subcontracting plans which was also not within the scope of our review.
4. Energy is correct that failure to achieve a subcontracting goal is not a basis by itself for termination for default. Failure to act in "good faith" would also have to be demonstrated. We recognized this point on page 9 of the report by stating that "Section 211 of Public Law 95-507 specifies that failure to comply in good faith with the requirements of the subcontracting plan can be considered a material breach of contract." (Underlining added.) Given Energy's comment, we incorporated additional language on page 20 of the report for greater clarification.
5. An evaluation of the performance of contractors on subcontracting goals of individual plans was outside the scope of our review so that we were unable to form any opinions as to which cases might warrant remedial action.
6. We modified the cited heading.
7. Our review did not attempt to identify what problems can occur when using incentive clauses to increase subcontracting opportunities for

Appendix III
Comments From the Department of Energy

small and small disadvantaged businesses. Consequently, our work provides no basis for making such comments and we can neither confirm nor dispute Energy's view on the matter.

8. In making this statement, we were not attempting to identify a deficiency in how subcontracting plans are evaluated but rather to emphasize that any evaluation of the adequacy of individual contract goals would have to be subjective and not based on quantitative analysis. We made a minor word change to clarify this point.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT
POLICY

April 29, 1980

POLICY LETTER 80-2

TO: THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Regulatory Guidance on Section 211 of Public Law 95-507.

There is a need in Government for uniformity and consistency in the application of procurement policy. This directive provides the uniform policy applicable to Section 211 of Public Law 95-507. The clauses and regulatory coverage that follow articulate this uniform policy. The Defense Acquisition Regulations (DAR), the Federal Procurement Regulations (FPR), and the National Aeronautics and Space Administration Procurement Regulations (NASA PR) shall be amended to conform to this policy. This guidance supercedes in its entirety the guidance previously published in the Federal Register on April 20, 1979, (44 F.R. 23610).

A. UTILIZATION OF SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS (OVER \$10,000)

The following clause shall be included in all contracts over \$10,000 except (1) contracts for services which are personal in nature and (2) contracts which will be performed entirely (including all subcontracts) outside any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico:

**UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL
BUSINESS CONCERNS OWNED AND CONTROLLED BY
SOCIOALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS**

(a) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.

(b) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the Small Business Administration or the contracting agency which may be necessary to determine the extent of the contractor's compliance with this clause.

(c) (1) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of

3. Other individuals may qualify as socially and economically disadvantaged under procedures which have been separately established by the Small Business Administration at 13 CFR 124.1-1(3)(iii).

4. The Office of Minority Small Business and Capital Ownership Development in the Small Business Administration has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business and shall answer inquiries from prime contractors and others regarding such eligibility.

5. The term "subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

C. SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING (NEGOTIATED).

All solicitations for negotiated contracts or negotiated amendments or modifications (including contracts, amendments, and modifications placed on a sole source basis), except those for procurements and set-asides pursuant to section 8(a) and section 15 of the Small Business Act as amended, which individually are expected to exceed \$500,000, or in the case of contracts for the construction of any public facility, \$1,000,000, and are required to include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals, shall include a provision which requires the apparent successful offeror, provided the offeror is not a small business concern, to negotiate a detailed subcontracting plan. The provision is as follows:

**SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS
SUBCONTRACTING PLAN (NEGOTIATED)**

1. This provision does not apply to small business concerns.
2. The term "subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

plan, the method used in determining the proportionate share of indirect and overhead costs incurred with (i) small business, and (ii) small disadvantaged business subcontractors shall be explained.

- b. The name of an individual within the employ of the offeror who will administer the subcontracting program of the offeror and a description of the duties of such individual;
- c. A description of the efforts the offeror will take to assure that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;
- d. Assurances that the offeror will include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals in all subcontracts which offer further subcontracting opportunities and to require all subcontractors (except small business concerns) which receive subcontracts in excess of \$500,000, or in the case of a contract for the construction of any public facility, \$1,000,000, to adopt and comply with a plan similar to the plan agreed to by the offeror. Such assurances shall describe the offeror's procedures for the review, approval, and monitoring for compliance with such plans;
- e. Assurances that the offeror will submit such periodic reports and cooperate in any studies or surveys as may be required by the contracting agency or the Small Business Administration in order to determine the extent of compliance by the offeror with the subcontracting plan; and
- f. A recitation of the types of records the offeror will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in the plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and efforts to identify and award subcontracts to such small business concerns. The records shall include at least the following (these records may be maintained on a plant-wide or company-wide basis unless otherwise indicated):

opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged persons to participate in the performance of the contract.

c. If a subcontracting plan acceptable to the contracting officer is not negotiated within the time limits prescribed by the contracting activity and such failure arises out of causes within the control and with the fault or negligence of the offeror, the offeror shall be ineligible for an award. The contracting officer shall notify the contractor in writing of his reasons for determining a subcontracting plan to be unacceptable. Such notice shall be given early enough in the negotiation process to allow the contractor to modify the plan within the time limits prescribed.

d. Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the contracting officer in determining the responsibility of the offeror for award of the contract.

e. It is the offeror's responsibility to develop a satisfactory subcontracting plan with respect to both small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals and that each such aspect of the offeror's plan will be judged independently of the other.

f. The offeror will submit, as required by the contracting officer, subcontracting reports in accordance with the instructions thereon, and as further directed by the contracting officer. Subcontractors will also submit these reports to the government's contracting officer or as otherwise directed, with a copy to the prime contractor's designated small and disadvantaged business liaison.

5. The failure of any contractor or subcontractor to comply in good faith with (a) the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals or (b) an approved plan required by this Small Business and Small Disadvantaged Business Subcontracting Plan (Negotiated) provision, will be a material breach of such contract or subcontract. ✓

(b) Letter Contracts - In the case of letter-type contracts requiring a subcontracting plan, the contracting officer shall seek to obtain a satisfactory plan within 90 days after award or before definitization, whichever comes first.

(c) Acceptability of Proposed Plan - In making determinations concerning the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) To the extent available, the contracting officer shall obtain the names and locations of principal proposed (i) small business, and (ii) small disadvantaged business subcontractors, including the type of product or service and the dollar value thereof to be awarded to each principal subcontractor. (This information will be used only to assist the contracting officer in making a determination as to the acceptability of the proposed percentage and dollar subcontract goals. The offeror will not be contractually bound to make subcontract awards to the designated subcontractors nor will the names of the subcontractors be included in any subsequent approved plan).

(2) Obtain and review information from all appropriate sources, including the prospective contractor, contract administration activities, Small and Disadvantaged Business Utilization Specialist, and SBA representatives concerning the apparent successful offeror's historical performance and achievements in placing subcontracts for the same or similar products or services with (i) small business, and (ii) small disadvantaged business subcontractors -- if this information is not available for a specific product or service, the offeror's past performance and achievements in the placement of total subcontract awards to (i) small business, and (ii) small disadvantaged business subcontractors shall be examined.

(3) Evaluate the anticipated potential for subcontracting to (i) small business, and (ii) small disadvantaged business considering the make-or-buy policies or programs of the apparent successful offeror, the nature of the products or services to be subcontracted, and the known availability of (i) small business, and (ii) small disadvantaged business concerns in the geographical area where the work will be performed.

(4) Advise the apparent successful offeror of (i) the availability of the sources of information on potential small business and small disadvantaged business subcontractors and (ii) the names of any known potential small business and small disadvantaged business subcontract sources. If the proposed goals are questionable, the

(d) Forwarding to SBA of Plans Involving Commercial Products

Contracting officers receiving company-wide plans under paragraph 6 (commercial products) of both solicitation clauses -- SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN (NEGOTIATED) and SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN (ADVERTISED) -- shall forward copies of such plans and approvals thereof to the Central Office of the Small Business Administration, 1441 "L" Street, N.W., Washington, D. C., Attention: AAPA.

(e) Failure to Comply in Good Faith with the Subcontracting Requirements

The failure of any contractor or subcontractor to comply in good faith with (1) the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals, or (2) an approved plan required by the Small Business and Small Disadvantaged Business Subcontracting Plan provision, will be a material breach of such contract or subcontract.

If such a breach has occurred in the prime contract, the contracting officer shall review the available facts to determine what remedy is in the best interests of the Government.

Such remedies may include Termination of the Contract pursuant to the Termination for Default Clause, negotiated reduction in contract price, negotiation of a revised subcontracting plan to correct deficiencies, or other negotiated measures the contracting officer may deem appropriate. In determining the proper remedy, the contracting officer shall consider as a minimum (1) the reasons attributed to the failure to comply in good faith, (2) the Government's need for the contract deliverables, and (3) the impact a proposed remedy may have on existing small and disadvantaged subcontractors.

If the failure to comply in good faith cannot be settled by agreement, a contracting officer decision pursuant to the contract disputes clause shall be issued.

**E. SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS
SUBCONTRACTING (ADVERTISED).**

All solicitations for formally advertised contracts or amendments or modifications thereto which, except those for procurements and set-asides pursuant to section 8(a) and section 15 of the Small Business Act as amended, offer subcontracting opportunities and are expected to exceed \$500,000, or in the case of contracts for the construction of any public facility, \$1,000,000, and are required to include the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals, shall include a provision which requires the bidder selected to be awarded the contract, provided the bidder is not a small business concern, to submit a detailed subcontracting plan.

The contracting officer shall include the solicitation notice below in all solicitations meeting the monetary threshold unless the contracting officer determines in writing that the proposed contract, amendment or modification, offers no subcontracting possibilities. If the contracting officer is not sure of the presence of subcontracting possibilities, the notice must be included; but the requirement to furnish a plan may be omitted on a showing by the bidder selected for award that subcontracting possibilities do not exist.

The provision is as follows:

**SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS
SUBCONTRACTING PLAN (ADVERTISED)**

1. This provision does not apply to small business concerns.
2. The term "subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for the performance of the original contract or subcontract.
3. The bidder acknowledges that it is aware of the subcontracting plan requirement in this provision; and if selected for award, will submit within the time specified by the contracting officer a subcontracting plan that will afford the maximum practicable opportunity to participate in the performance of the contract to small and small disadvantaged concerns, and will include:

e. Assurances that the bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the contracting agency or the Small Business Administration in order to determine the extent of compliance by the bidder with the subcontracting plan; and

f. A recitation of the types of records the successful bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in the plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and efforts to identify and award subcontracts to such small business concerns. The records shall include at least the following (these records may be maintained on a plant-wide or company-wide basis unless otherwise indicated):

(1) Small and disadvantaged business source lists, guides and other data identifying small and small disadvantaged business vendors.

(2) Organizations contacted for small and disadvantaged business sources.

(3) On a contract-by-contract basis, records on all subcontract solicitations over \$100,000, indicating on each solicitation (a) whether small business was solicited, and if not why not; (b) whether small disadvantaged business was solicited, and if not why not; and (c) reasons for the failure of solicited small business or small disadvantaged business to receive the subcontract award.

(4) Records to support other outreach efforts:

o Contacts with minority and small business trade associations,

o Contacts with business development organizations,

o Attendance at small and minority business procurement conferences and trade fairs.

or division's production generally (both for commercial and non-commercial products) rather than solely to the item being procured under the government contract. In such cases, the contractor shall be required to submit one company-wide, annual plan to be reviewed for approval by the first agency with which it enters into a prime contract (which requires a subcontracting plan) during the fiscal year, or by another agency satisfactory to the contracting officer. The approved plan will remain in effect for the company's entire fiscal year for all of the company's or division's commercial products.

The term "commercial products" means products in regular production sold in substantial quantities to the general public and/or industry at established market or catalog prices. A product which, in the opinion of the contracting officer, differs only insignificantly from the contractor's commercial product may be regarded for the purpose of this clause as a commercial product.

(End of Provision)

INSTRUCTIONS TO CONTRACTING OFFICERS

(a) Informational Goals. The contracting officer may, in a letter accompanying the solicitation or otherwise, inform the offeror of the goal the Government contemplates for subcontracting to both small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. Any such letter shall state that the goals are informational only and not legally binding.

(b) Notification of Unsatisfactory Plans. If the contracting officer believes that the subcontracting plan submitted pursuant to this section does not reflect the best effort by the bidder to award subcontracts to small and small disadvantaged firms to the fullest extent consistent with the efficient performance of the contract, he shall notify the agency's director of the Office of Small and Disadvantaged Business Utilization who shall in turn notify the Small Business Administration and request a review of the plan pursuant to Section 8(d)(10) and (11) of the Small Business Act. Such request for an SBA review shall not delay award of the contract. Prior compliance of the bidder with other such subcontracting plans under previous contracts will be considered by the contracting officer in determining the responsibility of the bidder for award of the contract.

ALASKA ELECTRIC LIGHT AND POWER CO.

134 N. FRANKLIN STREET



JUNEAU, ALASKA 99801

(907) 586-2222

February 9, 1982

General Services Administration, Region 10
GSA Center
Auburn, Washington 98002

Attn: Donna Hutchens
Chief, Building Services Contracts Branch
Contracts Division
Public Buildings Service

Re: Your letter dated October 30, 1981

The interruptible electric heat rate (Tariff Schedule 25) was developed based on an intensive cost of service study by the firm of CH2M Hill, Bellevue, Washington. This rate was subsequently reviewed and approved by the Alaska Public Utilities Commission. This rate applies to other customers and there are no other rate structures available which would give a better rate.

The 2.5 cents per kwh charge you refer to for sales to Glacier Highway Electric Association was a contract for standby power made with Glacier Highway Electric Association prior to the Snettisham Project providing a reliable source. The contract expired in 1975 and if it were to be renegotiated today would be substantially higher than 2.5 cents per kwh.

From Alaska Electric Light and Power Company's viewpoint, a contract is not needed, but if GSA wants one, we'll sign one per the criteria outlined in our Tariff Rate Schedule 25 - a copy of which is enclosed.

Your request for a sub-contracting plan doesn't seem appropriate as we do not anticipate any sub-contracting being performed in regards to providing this interruptible electrical service to the Federal Building in Juneau. The necessary facilities to supply this power are in place and all that should be involved in the future is meter reading, meter maintenance, billing, etc., by our own employees.

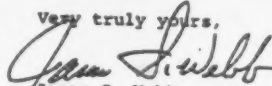
In summary, Alaska Electric Light and Power Company has been ready since October, 1980 to supply electric heat to the Federal Building. The power is to be provided from a

General Services Administration, Region 10
February 9, 1982
Page 2

renewable and clean energy source - the Federal Government's Snettisham Hydroelectric Project-at a net cost far below that of the oil heat presently used. Of the 3.5¢/kwh billed to GSA, 1.56¢/kwh is returned directly to the Federal Treasury through billings for wholesale power sales from the Snettisham Project to Alaska Electric Light and Power Company. The next cheapest rate for commercial or government sales is considerably more expensive than this interruptible rate schedule.

If you have any questions please contact me.

Very truly yours,


James S. Webb
Vice President

Enclosure a/s
CC: William A. Corbus, President, AELP
Robert Cross, Administrator, APA
JSW/ak



H. S. MULME, JR.
DIRECTOR

ARLINGTON COUNTY, VIRGINIA
DEPARTMENT OF PUBLIC WORKS

COURT HOUSE
ARLINGTON, VIRGINIA 22201



FEB 12 1981

February 11, 1981

Mr. Larry L. Moreau
Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, D. C. 20406

Dear Mr. Moreau:

Thank you for your letter dated February 9, 1981. Please consider this a "definite and final refusal" to enter into an area-wide contract for sewage disposal so long as those contracts require the implementation of Section 211 of Public Law 95-507.

Should you desire further discussions without the implications of this law, please contact me. As mentioned in our previous correspondence, we shall continue to provide sewage disposal service for federal installations as we have in the past.

Sincerely yours,

H. S. Mulme, Jr.

H. S. Mulme, Jr.

HSH:dch

cc: H. Attkisson, Chief, Utilities Services
Charles Flinn, Deputy County Attorney



C. C. Crowder
Director

**City Of Newport News
Department Of Public Utilities**

2400 Washington Avenue
Newport News, Virginia 23607

OCT 17 1983

October 14, 1983

Dr. John L. Stanberry
Assistant Commissioner
Office of Public Utilities
General Services Administration
Washington, D. C. 20405

Dear Dr. Stanberry:

In reply to your follow-up letter of August 30, 1983, there are many reasons why an areawide contract with GSA is not desired at this time. Let me quickly express also that I have no new reasons for this position, but can only reiterate some of the salient concerns we have expressed on numerous occasions previously to Mr. Moreau of your organization.

GSA's interpretation that a subcontracting plan must be a condition of an areawide contract is undesirable, especially when this will undoubtedly create additional reports, yet unspecified, plus other unnecessary accounting and reporting costs. The Newport News Waterworks is a municipally owned utility, subject to state and local laws, regulations and ordinances. Accordingly, it is believed there is no need for GSA to impose upon us the so-called subcontracting plan.

Unless the subcontracting plan condition can be removed, we prefer to serve customers individually, in accordance with our established policies.

Yours very truly,

C. C. Crowder
Director

CCC/shj



THE ILLUMINATING COMPANY
P.O. BOX 5000 - CLEVELAND, OHIO 44101 - TELEPHONE (216) 622-9800 - ILLUMINATING BLOG - 55 PUBLIC SQUARE
Serving The Best Load in the West

September 14, 1981

Mr. A. M. Kalata
Contracting Officer
General Services Administration - Region 5
230 South Dearborn Street
Chicago, Illinois 60604

Re: Contract Between The Illuminating Company and GSA for Service to the Anthony J. Celebrezze Federal Office Building

Dear Mr. Kalata:

We have reviewed your proposed contract. Our Rates, Legal and Energy Application people find it very satisfactory in many respects, but we are unable to sign it in its present form. In this letter, we offer amendments to your proposal which we will designate as our counterproposal, subject to later change as necessary. Many of our proposals reflect operative facts rather than a different philosophy on distribution of business or legal risks.

Following are the changes we propose:

Form 1683

1. Service Location - use 10,000 kW instead of 6,500 kW since there is no additional charge and our minimum charge is stated as 50% of the contracted demand but in no case less than 5,000 kW.
2. Point of Delivery - detailed on addendum #3 rather than #7. Therefore, strike reference to addendum #7.
3. Service Characteristics - the 2% allowable variation should be changed to 5%. We operate within the limits of normal 11,000 volt system conditions established by the American National Standards Institute Regulation C-84.1-1977.
4. Charge - the estimated annual consumption should be changed to 19,900,000 kWh at an estimated cost of \$970,000 to reflect most recent usage and charges.
6. Special Terms and Conditions - reference to GSA Form 1684 should be eliminated and FUCO No. 11 Sheets No. 5, 9, 13, and 16 of our General Rules and Regulations should be substituted.

5/6

Mr. A. M. Kalata

- 2 -

September 14, 1961

In addition, we propose on the back of GSA Form 1683 (TERMS AND CONDITIONS) the following changes:

PAYMENT OF SERVICES, delete paragraph (a). For (c), change 30 to 10, and for (d), add at the end "Provided, however, interest charges at the rate provided for by Addendum No. 1 apply to amounts paid hereunder."

Also, we propose deleting entirely the provisions of GSA 1684 (TECHNICAL PROVISIONS). Under Addendum No. 1, we propose to insert a new paragraph 5 to replace the now deleted TECHNICAL PROVISIONS. Paragraph 5 would read, "The provisions of Contractor's General Rules and Regulations, 2nd Revised Sheet No. 5, 3rd Revised Sheet No. 9, 2nd Revised Sheet No. 13, and 2nd Revised Sheet No. 16, as may be later amended, are attached hereto and incorporated by reference, as if restated, except for that language explicitly deleted." This language refers to the Company's General Rules and Regulations which provide for matters otherwise provided for under TECHNICAL PROVISIONS. Also under Addendum No. 1, we propose to make the same dollar changes as on the first page. The tariffs attached will be those of the Large Industrial Schedule in effect at the time of contracting.

Our lawyers believe the Illuminating Company will fulfill the requirements of this contract without subcontracting. They do not believe our contracts with suppliers for coal and other raw materials are subcontracts. If GSA agrees that we do not subcontract, our lawyers would prefer language in the contract to that effect and references to a Subcontracting Plan deleted. Our NASA contract recently signed handles it in this manner.

Also, our lawyers want provisions regarding Utilization of Women Owned Business Concerns deleted, since they believe they extend beyond the scope of the executive order implementing those requirements.

I ask that you contact me to indicate your position on our proposals. If you would like to meet, I will arrange it. I suggest Cleveland where more representatives of the Illuminating Company are available.

Very truly yours,

William J. Moran / cjd

William J. Moran
Senior Representative
Commercial Energy Application
Department

WJM:lhb

Enclosures

cc: Larry S. Moreau
Director, Public Utilities Service Division
Office of Public Utilities

THE EAST OHIO GAS COMPANY

EAST NINTH AT SUPERIOR

MAILING ADDRESS: P.O. BOX 678
CLEVELAND, OHIO 44101

CLEVELAND, OHIO

May 26, 1982

Robert Riley
General Services Administration
Office of Public Utilities T.U.S.
425 I Street, N.W.
Washington, D.C. 20406

RE: GAS SERVICE FOR VETERANS ADMINISTRATION MEDICAL CENTER,
10000 BRECKSVILLE RD. AND 10701 EAST BLVD., CLEVELAND, OHIO

I am writing to you at the suggestion of Mildred Zarzour, VA Contracting Officer. We have been discussing a contract for gas service at the above locations. In our situation, the contract is being requested to meet your paperwork procedures and not to commit the VA to any particular gas purchase and not to commit East Ohio to serve gas in any but its normal way at its PUCO-approved rates.

Contract discussions are bogged down as regards the proposed Paragraph 22, Subcontracting Plan for Minorities and Small Businesses. It seems to me that the proposed contract is not one which offers subcontracting possibilities within the contemplation of 15 USCA §637(d)(4)(B)(iv) and that the same would generally be true of other routine utility service situations. I have discussed this with Larry Moreau of your office and am expecting his reflections on the matter.

If you agree with me, Paragraph 22 could be changed to read as follows: "The Government has determined that no subcontracting plan is required of Contractor for this contract pursuant to 15 USCA §637 for the reason that the contract does not offer subcontracting possibilities." If this change is acceptable, please advise and I will consider the remainder of the proposed contract.

The facilities to be served are located within our northeast Ohio service area. We are regulated by the Public Utilities Commission of Ohio. The rates available to the VA are the same rates as are available to the remainder of our almost one million customers. We have provided this service for a long time, and in recent years have not had a contract as is herein being requested. I submit that there is no need for a contract in order for this service to continue.

Robert Riley
Re: Proposed Gas Service Contract for
VA Medical Centers, Cleveland, Ohio
May 26, 1982
Page 2

In fact, I suggest that you give consideration to a change in policy so that the government agencies would normally purchase utility service without a separate contract according to the normal terms and conditions applicable to other customers of the utility. This would not preclude a negotiated contract in cases where a special rate is available to the government or where the utility is not already subject to adequate state regulation or where the utility is to provide extraordinary services.

If you wish to discuss the proposed contract or my suggestion that there be no contract, please call me at 216/623-4830.



BENTON BASSETT
Senior Attorney
Legal Department

BB/EH
CC: Mildred Zarzour
Your File 541/134B



May 24, 1984

John L. Stanberry, Ph.D.
Assistant Commissioner
Office of Public Utilities
Public Buildings Service
General Services Administration
Washington, D.C. 20405

Dear Dr. Stanberry:

The purpose of this letter is to acknowledge receipt of your April, 1984 letter to Mr. J. J. Hudiburg, our President, and to communicate to you our position concerning the overall GSA contract proposal.

As you recall, during the negotiations between us, I expressed concern at our meetings that the contract could impose additional administrative expense on our Company and ultimately our ratepayers. For example, it envisions a more centralized interface. The servicing of electric service accounts within our Company, however, is essentially decentralized throughout our five geographic divisions. The personnel in our district offices are knowledgeable and practiced in the handling of electric service under the Florida Administrative Code, Rate Schedules, and our General Rules and Regulations as approved by the Florida Public Service Commission. Thus, our operations do not lend themselves well to a more centralized concept.

Despite the concerns raised early in our discussion, we have continued negotiations with you in the hope that the issues could be resolved and a cost effective document agreed upon. It is our position that this has not been accomplished; therefore, Florida Power & Light Company sees no business reason to enter into the proposed contract.

We remain concerned with your statements made at our August 26, 1982, meeting in Miami and at our October 21, 1983, meeting in Washington. As you recall, you advised Florida Power & Light Company representatives at these meetings that, if we failed to execute the agreement, there might be media coverage of that failure, which you alleged would be due to the so-called "social covenants." This is particularly disturbing because we are committed to the programs covered by these covenants, as evidenced by the attached policy statement concerning minority contracting and purchasing.

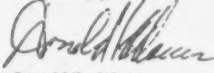
John L. Stanberry, Ph.D.

Page 2

May 24, 1984

As you know, both GSA and FPL personnel have invested considerable time and expense in the hope of reaching a cost effective agreement. We appreciate the courtesies extended to us. Please let me know if you would like to discuss any aspect of this matter further.

Very truly yours,



Donald E. Adams
Commercial, Industrial, Agricultural Manager

DEA:hdn
Attachment

FLORIDA POWER & LIGHT COMPANY
POLICY FOR EXPANDED UTILIZATION
OF
SOCIOALLY AND ECONOMICALLY DISADVANTAGED
SMALL BUSINESS CONCERNS

Florida Power & Light Company (FPL) is an Equal Opportunity/Affirmative Action Employer. Additionally, it is the policy of FPL to actively seek out and encourage qualified socially and economically disadvantaged small business concerns to participate in FPL procurement activities on a competitive bid basis.

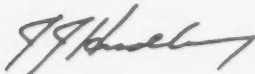
For purposes of this policy, the term "socially and economically disadvantaged small business concern" means a small business as defined in Section 3 of the Small Business Act and Regulations issued under that section:

1. which is at least 51% owned by one or more socially and economically disadvantaged individuals; and
2. whose management and daily business operations are controlled by one or more such individuals.

As used in this policy, the phrase "socially and economically disadvantaged individuals" includes the following (unless otherwise determined by appropriate authorities): Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, women's business enterprises, and other recognized minorities as well as any other individual found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act.

FPL will assist all business enterprises including socially and economically disadvantaged concerns in understanding the bidding/procurement processes of FPL and in pre-qualifying preparatory to performance of work/services or supplying materials/equipment.

FPL is committed to increasing the number of bid opportunities available to socially and economically disadvantaged vendors and contractors. We will ensure that qualified socially and economically disadvantaged small business concerns are considered whenever practicable in the purchase of goods or services required by the Company consistent with our obligation to provide a quality product on a timely basis at reasonable cost to our customers.



J. J. Hudiburg
President and
Chief Executive Officer

Issued 7/76
Revised 5/84



LONG ISLAND LIGHTING COMPANY

480 EAST MAIN STREET • PATCHOGUE, NEW YORK 11772

TEL. 475-3000

November 20, 1985

Mr. Robert Leuffen
General Services Administration
26 Federal Plaza
Room 2341
New York, N.Y. 10278

Dear Mr. Leuffen:

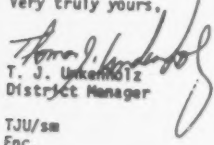
Here is the signed contract for the service in Holtsville. Thank you very much for your assistance and I apologize for the delay in returning it to you.

Our Legal Department has advised me that we cannot agree to the provisions of GSA Form 1685-A from paragraphs 21 on until they have had an opportunity to research these provisions. In order to prevent further delay in this contract, we are returning an executed copy with the pages beginning at paragraph 21 of Form 1685-A deleted.

I would appreciate it if you would notify Finance that they can release the checks.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,


T. J. Unkenholz
District Manager

TJU/sm
Enc.

(Auditor's Note TP 21 relates to when-Owned Business Concerns Subcontracting Plan) APPAR. (y) the SUBCONTRACTING PLAN CLAUSE PRECEDES THIS CLAUSE

1226

February 16, 1982

Mr. Larry L. Moreau, Director
Public Utilities Services Division
Office of Public Utilities
General Services Administration
Washington, D.C. 20406

FEB 24 1982

Re: Contract for Electrical
Service - Muskogee VA Hospital

Dear Mr. Moreau:

Your letter of September 22, 1981, to Mr. John Harbour in response to his letter to you dated February 18, 1980, has been referred to me.

After reviewing the documents, I must inform you that the requirement of submission of a Subcontracting Plan which you have added is unacceptable. Additionally, the clauses set forth in Mr. Harbour's letter of February 18, 1980, under the topic "2. Form 1685" are still unacceptable.

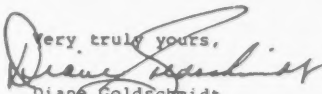
The basic problem stems from the fact that you view this as a 10-year contract which, because of the aggregate dollar amount, would require provisions which are objectionable.

Oklahoma Gas and Electric Company takes the view that this is a year-to-year contract. Therefore, the need for the government's form is alleviated since the dollar limit is not exceeded.

To my knowledge there are no special circumstances which would give rise to the necessity of a contract for a term longer than one year which is the standard term under our filed tariffs.

A representative of OG&E met with Mr. Kenny Rader per your suggestion. In order to resolve our differences and in an attempt to accommodate the government, Mr. Rader was given the option of a one year contract or continuing service under the present system. Mr. Rader informed OG&E that service was to be continued under the present system.

Please direct your letter to me if you should have any further comments or question.

Very truly yours,

Diane Goldschmidt
Attorney

DG:mch
cc Ken Baltes
Kenny Rader

1320

APPENDIX B

JUL 16 1984

POTOMAC ELECTRIC POWER COMPANY

1900 PENNSYLVANIA AVE., N.W.

WASHINGTON, D.C. 20006

(202) 670-2300

ALAN G. KIRK, Jr.
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

July 13, 1984

John L. Stanberry, Ph.D.
Assistant Commissioner
General Services Administration
Office of Public Utilities
Public Buildings Service
Washington, D.C. 20405

Dear Dr. Stanberry:

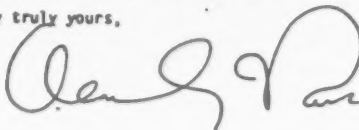
Your June 27th letter to Mr. Mitchell has been forwarded to me for response. In your letter, you requested that PEPCO "prepare a subcontracting plan as soon as possible for GSA's review and approval." Notwithstanding the absence of an "awardwide contract with GSA, you have suggested that PEPCO is required to prepare and submit such a plan by Public Law 95-507, under the reasoning of United States v. New Orleans Public Service Company, Inc., 553 F.2d 459 (5th Cir. 1977).

I do not share your interpretation of Public Law 95-507 as mandating GSA approval of a PEPCO formal subcontracting plan based on the existing service relationship.

Please note that applicability of 15 U.S.C. 5637(d)(4)(B) requires negotiation of a subcontracting plan only, among other things, if: 1) the procurement was negotiated (See, 4(B)(1)); and 2) the contract is currently being let, modified or amended (See, 4(B)). Since PEPCO continues to serve the government pursuant to tariff, those conditions do not appear to be satisfied.

In reviewing the subcontracting plans which you enclosed, however, we remain convinced that PEPCO's efforts in this area have been extremely effective. While I find no requirement to submit a formal subcontracting plan for GSA review and approval, I have no objection to describing to GSA PEPCO's development program for informational purposes, if that would be helpful to you. Should you wish PEPCO to provide information concerning its program with this understanding, please let me know, and we can make whatever arrangements seem appropriate.

Very truly yours,



cc: Mr. Edward F. Mitchell

14 - 0



San Diego Gas & Electric

September 2, 1983

FILE NO. SLE 510

CC # 50073

Mr. Clifford Whitefield
 Chief, Buildings Services Contracts Branch
 Real Property Contracts Division
 Public Buildings and Real Property
 General Services Administration - Region 9
 525 Market Street
 San Francisco, CA 94105

Subject: The Subcontracting Plan

Dear Mr. Whitefield:

While negotiating a contract (submitted to SDG&E on November 17, 1983) for electrical service to the Veterans Administration (VA) Hospital, General Services Administration (GSA) indicated that San Diego Gas & Electric must also execute a "Subcontracting Plan" (Plan).

SDG&E has reviewed Public Law 95-507. Legal counsel has advised that SDG&E is not required under the law to file a plan. Therefore, the purpose of this letter is to inform you of the Company's decision not to submit a Plan.

In 1978, Congress amended the Small Business Act to enhance the federal subcontracting opportunities for small businesses and small businesses owned by the disadvantaged. The act requires that before any contract may be awarded which exceeds \$500,000 and offers subcontracting possibilities, the apparent offeror shall negotiate with the procurement authority a Subcontracting Plan.

We do not feel that the provision of electric service will require, or result in, the need for subcontracting. To further clarify; in the ordinary course of business, no subcontracting possibilities will directly result from the execution of a contract to provide electrical service to the VA Hospital.

We request that your office prepare a new contract ¹submit without the Subcontracting Plan as an integral part thereof, and we will proceed with corporate review and approval.

As a point of information, SDG&E does advocate and possess an active Purchasing Policy regarding minority contractors and suppliers. We have pledged to broaden our sources of suppliers of goods and services by increasing the participation of minority and women-owned business enterprises in the procurement of goods and services. In addition, our basic policy advocates the following:

15/26

Attachment B, page 2

Mr. Clifford Whitefield
Page 2

September 2, 1983
SLE 510

- A. Continued on-going efforts to identify qualified minority and women suppliers and contractors and add them to our approved bidders' list.
- B. Assistance, through education or special consideration, of minority and women-owned businesses to become eligible for SDG&E business.
- C. A continuing effort will be made to increase the dollar volume of purchases from minority and women-owned business enterprises.
- D. On major project contracts, to the extent practicable, establish a requirement of the prime contractor to actively seek minority and women-owned subcontractors and suppliers.
- E. Maintain and monitor records of contracting activity with minority and women-owned business enterprise.
- F. Allocate responsibility to carry-out the foregoing among SDG&E's three purchasing groups; namely, General Supplies, Project Buying and Major Project Buying. Specific action plan for each group will be incorporated into the yearly work plan for each group.
- G. Insure prompt payment for goods and services provided by minority and women-owned business enterprises.

Our position is a matter of record and is currently on file with the State of California Public Utilities Commission.

If you feel it necessary, I would be happy to arrange a meeting between yourself and involved persons from SDG&E to discuss the details of our decision.

Should you have any questions, please call Kirk Romag at 619/699-5446.

Best regards,



J. F. Drummer
Governmental Services Supervisor

JFD:KAR:rb

Tucson Electric Power Company

220 West Sixth Street
P. O. Box 711
Tucson, Arizona 85702

FEB 1 1982

John A. Harper
Attorney

January 27, 1982

(602) 684-3655

Larry L. Moreau
Director, Public
Utilities Services Division
Office of Public Utilities
GSA
Washington, DC 20406

Re: Proposed Areawide Contract No. GS-00S-67092

Dear Mr. Moreau:

I am in receipt of your letter dated December 24, 1981, and addressed to Mr. Dennis Nelson concerning the status of GSA's proposed areawide utility contract No. GS-00S-67092.

Please be advised that discussions between the government and Tucson Electric Power Company ("TEP") have taken place since your formal status review request of July 16, 1981. Indeed, since that time numerous discussions have occurred between myself and representatives of the GSA from the San Francisco offices. To date, their emphasis has been the pursuit of individual contracts.

TEP is satisfied with the course the parties' negotiations have followed. Our reluctance to enter into an areawide contract, as has been expressed and subsequently reiterated to representatives of your department, has been the imposition of certain federal obligations upon TEP without any corollary benefits flowing from the satisfaction of those obligations. For example, the mandate for a subcontracting plan pursuant to 14 U.S.C. 632(5)(A) et seq is triggered when the contract amount exceeds \$500,000 and there is bid solicitation. Such a plan seems wholly inappropriate where there clearly exists no bid solicitation in reference to electrical service. Moreover, GSA has requested contracts with ten-year terms. The consequence of such a provision is to bootstrap the contract

Larry L. Moreau

-2-

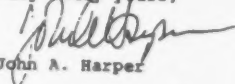
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such that the dollar threshold of 632(5)(A) is met. While there are, perhaps, certain accounting benefits to be derived by the GSA from an area wide contract, the cost to TEP associated with the implementation and maintenance of the contract cannot be justified by the revenues under the contract.

Should the GSA wish to reconsider either the contract's term or the question of whether there is a solicitation of a bid in this contract, then the feasibility of executing an areawide contract would be enhanced.

If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,


John A. Harper

JAH:jec

COMMISSIONERS

Alexander Williams Jr.
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Leonard H. Teitelbaum
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James L. Moore
Robert M. Pottier
Robert P. Wolf
Richard G. Hovener
General Manager

Washington Suburban Sanitary Commission

4017 Hamilton Street • Hyattsville, MD 20781 • (301) 699-4000
Department of Engineering • 8103 Sandy Spring Rd. • Laurel, MD 20707

FEB 5 1987

Mr. Larry L. Moreau
Director, Public
Utilities Services Division
Office of Procurement
General Service Administration
Washington, D. C. 20405

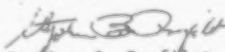
Dear Mr. Moreau:

As you know, from prior telephone conversations, we have reservations about executing multiple year contracts for each of our Federal water/sewer customers. Actually, we see little merit to administering even annual contracts for Federal Offices. To go beyond that, to commit ourselves to annual reporting of our small business sub-contracting outlays within our servicing jurisdiction, would amount to an added cost to our total customer population.

This Commission is a state agency and has been declared such by both the Federal and local circuit courts. As a government (State) controlled monopoly, the Commission is given the sole responsibility for furnishing water and treating sewage in the Washington Suburban Sanitary District comprised of Montgomery and Prince George's Counties. Each Federal agency or office location we serve is billed either monthly or quarterly for services already rendered--yet we incur the treatment cost of providing such service to the site prior to their billing. Each of our customers is billed on the basis of metered consumption, with rates approved by public hearing. For comparative purposes it is something akin to telephone billings for which users are billed after use--but it is unlikely that you have multiple year contracts with them.

Even though this agency is regarded as a pioneer in adopting laws for minority contracting, the implications of what your Agency seeks would nevertheless compel us to adopt costly administrative tracking procedures. Whether or not it was the intent of Congress to apply the essence of the Small Business Investment Act of 1958 (PL 95-507) on a sovereign-to-sovereign basis is unclear. Our reading of Public Law 95-507 suggests that the law does not have the latitude for multiple year contracting; the cited law further appears to be silent on public utility participation for recurring type services.

Sincerely,


Stephen B. Profflet
Contracting Officer

11/22

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

OFFICE OF
LEGAL COUNSEL
GSA

MAR 27 1987

MEMORANDUM FOR CLYDE C. PEARCE, JR.
General Counsel
General Services Administration

You have requested our opinion on whether a public utility, which sells service under tariff to the Federal Government, but which refuses to enter into a formal contract with the Government covering that service, is nonetheless legally required to satisfy the subcontracting plan requirement of Section 211 of Public Law 95-507, codified at 15 U.S.C. 637(d)(4), (5). For the reasons set forth below, we conclude that such utilities are indeed so required.

15 U.S.C. 637(d)(2) provides that the following clause "shall be included in all contracts let by any federal agency . . .

(A) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any federal agency. . . .

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause. 15 U.S.C. 637(d)(3)(A), (B).

¹ Your letter also makes passing reference to a variety of other contracting requirements dealing with clean air and water standards, hiring of the handicapped, etc. Because our opinion largely turns on the language and legislative history of the Small Business Act, it is limited to that Act. We express no opinion on whether utilities are bound by other, different requirements.

*Copy was mailed to
Wash & Thuridge 7/1/11*

Sections 637(d)(4) and (5) require contractors who are selected pursuant to either the "negotiated" or "formal advertising" methods, respectively, and whose contracts "offer[] subcontracting possibilities" to prepare "subcontracting plan[s]." Section 637(d)(6) specifies the elements to be contained in such plans. They include "percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals."

Pursuant to 40 U.S.C. 481(a)(3), and 48 C.F.R. 1-8.301.4-5, GSA is charged with procuring utility service contracts. On its face, 15 U.S.C. 637(d) would seem to apply to these utility contracts, as it does all other contracts. Nevertheless, you indicate that several utilities believe that they fall outside the scope of section 637(d), relying on the following arguments: (1) pursuant to section 637(d)(4)(B), the subcontracting plan requirements attach only to contracts which have been formally negotiated, and they have refused to negotiate; and (2) they have no contract at all with the federal government, within the meaning of section 637(d), but provide services pursuant to state tariffs which require them to provide service to all customers.

Neither of these contentions withstands scrutiny. The first, we think, is simply mistaken. Section 637(d)(4)(B) provides that subcontracting plan requirements apply to contracts which are "to be awarded, or [were] let pursuant to the negotiated method of procurement" (emphasis added). In our view, the plain sense of that language is to specify the type of procurement covered (i.e., the "negotiated method") in order to distinguish it from the "formally advertised" method of procurement, which is covered by section 637(E)(5). It does not announce a

² Gordon Creed, of your office, informs us that all government contracts, by definition, fall into either the "negotiated method" or "formally advertised" category.

³ You indicate that the vast majority of government utility contracts meet the requisite dollar minimum of \$500,000. We note the further requirement that, in order to be covered, a contract must "offer[] subcontracting possibilities." Section 637(d)(4)(B)(iv); 637(d)(j)(A)(iv). While we, of course, defer to your expertise on the question of whether utility contracts offer such "subcontracting possibilities," our opinion is necessarily conditioned upon such a determination. Moreover, to the extent that "socially and economically disadvantaged" is defined in a race-conscious manner by statute (15 U.S.C. 637(3)(C)), it must be applied consistently with the requirements of equal protection. Specifically, any such preferential treatment must be premised upon a convincing showing of prior discrimination by the governmental unit involved and be "narrowly tailored" to remedy such discrimination. See generally, Wvcan v. Jackson Bd. of Education, ___ U.S. ___, 106 S.Ct. 1842 (1986).

requirement that "negotiated method" contracts must actually be negotiated in order to fall within section 637(d). In fact, the net effect of subsections (E)(4) and (E)(5) is to require subcontracting plans for all government contracts that meet the requisite dollar amount and that "offer[] subcontracting possibilities." Consequently, the extent to which a utility actually has negotiated -- or refused to negotiate -- specific contract terms is irrelevant. If the utility holds a government contract, within the meaning of section 637(d), it is bound by the provisions of that section.

The essential question, therefore, is whether utilities are indeed contractors within the meaning of section 637(d). The utilities advance two interrelated arguments as to why they are not. They contend that they have no contract with the government at all because (a) the only applicable contract is their state tariff, and (b) state law compels them to serve all customers, including the federal government, and this compulsion vitiates any consent on their part to the federal contract provisions.

We begin our analysis by noting that the legislative history of Public Law 95-507 indicates that Congress intended these provisions to apply to all government contracts, including those not competitively negotiated. The House Conference Report on the bill stated that

It is the intent of the conferees that these subcontracting requirements are not to be construed as being limited to competitively negotiated procurements. Each year executive agencies award large amounts of noncompetitive negotiated (sole source) contracts which provide opportunities for subcontracting. Federal agencies should make provisions to insure that, prior to the award of such contracts, contractors be required to submit contracting plans.

H.R. Rep. No. 95-1714, 95th Cong., 2d Sess. 26, reprinted in (1978) U.S. Code Cong. & Adm. News 3879, 3887.

Moreover, in a similar context, both of the utilities' arguments were rejected by the Fifth Circuit in United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977),

* Indeed, 15 U.S.C. 637, which Public Law 95-507 amended, specifically mentions sole source utility procurements in subsection (g)(1)(E), where it exempts them from certain unrelated notice requirements. Thus, Congress was not unaware of the peculiarities of that type of procurement when it passed Public Law 95-507. And while Public Law 95-507 did prescribe one express exception to its subcontracting plan requirement, contractors who are themselves small businesses (see section 637 (d)(7)), it did not expressly exempt utilities.

vacated on other grounds and remanded, 436 U.S. 942 (1978).⁵ In that case, the utility argued that it was not bound by the affirmative action requirements of Executive Order 11246 and its implementing regulations since "it [was] not furnishing energy to the government pursuant to any contract, but . . . pursuant to its franchises, granted by the City, which require [it] to provide power to all who request it." 553 F.2d at 464. The utility further argued that it had not agreed to the affirmative action provisions required by the Executive Order of all government contractors. Indeed, it had specifically refused to agree to them. *Id.*

The court rejected both arguments. The court found, from the parties' course of dealing, that the utility did indeed have a contract with the government. The court noted that the mere fact "[t]hat the company services customers under local franchises does not negate the obvious fact that [it] renders such services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing." 553 F.2d at 469. The court further remarked upon the unique features of government contracting, stating that "where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly agreed to by the parties." 553 F.2d at 469.⁶

⁵ A threshold issue in the case was the legality of an administrative search. The Court vacated the Fifth Circuit's opinion on that basis and remanded for reconsideration in light of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). On remand, the Fifth Circuit remanded to the District Court, 577 F.2d 1030, which largely adhered to the principles set forth in the Fifth Circuit's earlier, vacated opinion. 480 F.Supp. 705. On appeal from that decision, the Fifth Circuit reaffirmed its earlier views on federal contract law, but again remanded on the Fourth Amendment question. 638 F.2d 899, 906. The district court again adhered to its judgment, 510 F.Supp. 911, and the Fifth Circuit reversed. 723 F.2d 422.

⁶ The court cited M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1304 (D.C. Cir. 1971) (clause that contract terminable "for the convenience of the government" implied in all government contracts, because required by regulation); G.L. Christian & Assoc. v. United States, 312 F.2d 418, 424 (Ct.Cl. 1963) (where there is "a legal requirement that the . . . contract contain the standard termination clause . . . the contract must be read as if it did.") The court also made a similar point in its opinion following remand. See 638 F.2d at 906.

Under this analysis, we believe utilities are contractors within the meaning of section 637(d). It is true that the non-consensual inclusion of federal contract terms seems particularly troubling in situations where state law mandates the transaction. It may appear that utilities are being unfairly whipsawed by state and federal law -- they are required by state law to service all customers, including the federal government; because they service the federal government, they are required by the terms of their federal contract to implement a small business subcontracting program. Nevertheless, this predicament results largely from requirements which attach to the utilities' legally-protected monopoly status. By engaging in a business which is a legally-established and regulated monopoly, utilities must be deemed to accept both the benefits and burdens attendant upon that status.

In sum, the obligations of Public Law 95-507 are implied by law in those government utility contracts which are above the requisite amount, and which afford opportunities for subcontracting, whether or not they are expressly included in a written agreement. This is so regardless of the utilities' status as legally-established and regulated monopolies, and regardless of whether they have specifically consented to the relevant contract provisions.



Douglas W. Kmiec
Deputy Assistant Attorney General
Office of Legal Counsel

⁷ To the extent that state law specifies that a utility's service agreement with a customer is not a contract, but merely a by-product of the utility's state tariff, that requirement must yield under the Supremacy Clause to Federal law requiring all such purchases to be made pursuant to contract.

⁸ We express no opinion on whether any particular state law actually requires the delivery of service to a customer who places additional conditions on the receipt of that service. If state law does not require the acceptance of such additional conditions, the utility may be excused from the provision of service; of course, if service is still provided, even absent the compulsion of state law, then we believe the additional conditions related to affirmative action would be applicable to the utility. See note 6 and accompanying text.

⁹ Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973); see also, New Orleans Public Service, 553 F.2d at 469-470. (Indeed, even as the utilities here claim that they are victimized by their monopoly status, they use their monopoly power to do business with the government without a formal contract.)

Sec. 211. Section 8(d) of the Small Business Act is amended to read as follows:

"(d)(1) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."

"(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which—

"(A) does not exceed \$10,000;

"(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(C) is for services which are personal in nature.

"(3) The clause required by paragraph (2) shall be as follows:

"(A) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."

"(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

"(C) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern—

"(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

"(ii) whose management and daily business operations are controlled by one or more of such individuals.

"The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

"(D) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals."

Contract opportunities for certain small business concerns.
15 USC 637.

Definitions.

15 USC 632.

"(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed \$1,000,000, in the case of a contract for the construction of any public facility, or \$500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

"(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

"(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

"(ii) is required to include the clause stated in paragraph (3),

"(iii) may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000 in the case of all other contracts, and

"(iv) which offers subcontracting possibilities, the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

"(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

"(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of the contract.

"(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided*, That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

"(3)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

"(i) is to be awarded pursuant to the formal advertising method of procurement,

"(ii) is required to contain the clause stated in paragraph (3) of this subsection,

"(iii) may exceed \$1,000,000 in the case of a contract for the construction of any public facility, or \$500,000, in the case of all other contracts, and

"(iv) offers subcontracting possibilities, shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a sub-

Incentives for
small business
subcontracting.

Subcontracting
plans.

contracting plan which incorporates the information prescribed in paragraph (6).

"(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

"(6) Each subcontracting plan required under paragraph (4) or (5) shall include—

"(A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

"(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

"(C) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

"(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,000,000 in the case of a contract for the construction of any public facility, or in excess of \$500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

"(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

"(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and efforts to identify and award subcontracts to such small business concerns.

"(7) The provisions of paragraphs (4), (5), and (6) shall not apply to offerors or bidders who are small business concerns.

"(8) The failure of any contractor or subcontractor to comply in good faith with—

"(A) the clause contained in paragraph (3) of this subsection, or

"(B) any plan required of such contractor pursuant to the authority of this subsection to be included in its contract or subcontract,

shall be a material breach of such contract or subcontract.

Breach of contract.

"(9) Nothing contained in this subsection shall be construed to supersede the requirements of Defense Manpower Policy Number 4A (32A CFR Chap. 1) or any successor policy.

"(10) In the case of contracts within the provisions of paragraphs (4), (5), and (6), the Administration is authorized to—

"(A) assist Federal agencies and businesses in complying with their responsibilities under the provisions of this subsection, including the formulation of subcontracting plans pursuant to paragraph (4);

Review.

"(B) review any solicitation for any contract to be let pursuant to paragraphs (4) and (5) to determine the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of any contract resulting from any solicitation, and to submit its findings, which shall be advisory in nature, to the appropriate Federal agency; and

Subcontracting
plans, compliance
evaluation.

"(C) evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or in the case of contractors having multiple contracts, on an aggregate basis.

Report to
congressional
committees.

"(11) At the conclusion of each fiscal year, the Administration shall submit to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives a report on subcontracting plans found acceptable by any Federal agency which the Administration determines do not contain maximum practicable opportunities for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts described in this subsection."

✻ Added by Public Law 98-577

(d) (1) It is the policy of the United States that ~~small~~ business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. 132/

**BRIEFING PAPER ON THE SMALL BUSINESS AND
SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PROGRAM**

Background:

Section 211 of Public Law 95-507 (1978) requires that all Federal contracts that exceed \$500,000 (\$1 million, if construction) contain a subcontracting plan for small and small disadvantaged business (SDB's) if (a) the award is made to other than a small business; (b) the contract has subcontracting possibilities; (c) performance is to take place in the United States, its territories or possessions; and (d) the services called for under the contract are not purely personal in nature.

Each subcontracting plan is to contain six (6) elements, the first of which is subcontracting goals -- one for small business and one for SDBs.

The statute specifically provides that no covered contract may be awarded unless the apparent successful offeror or bidder first negotiates or submits a subcontracting plan that contains the maximum practical opportunity for small business and SDB's to perform as subcontractors.

The failure of a contractor to comply in good faith with the subcontracting plan must be considered a material breach of the contract. In addition, prior compliance of the offeror or bidder with previous plans must be considered when determining the responsibility of the firm for the award of a new contract.

Statistics:

According to SBA's annual report on small business contracting for FY 1987, covered subcontracts totalled \$63.4 billion. Of that amount, small business received about \$26 billion or 41%. From a reading of both SBA and MBDA data, it appears that SDB's received \$1.53 billion of this amount or only 2.4 percent. (Prior to P.L. 95-507 only DoD maintained subcontracting data on small and small disadvantaged business. In FY 1976 SDB's received only .9% of the subcontract dollar, while small business received 37.5%). In FY 1987, of the 7,133 subcontracting plans reviewed by SBA's PCRs, 706 or nearly 10% were disapproved. Under such circumstances, the plan is either revised to take into account SBA's objection or is reported to Congress in a statutorily required annual report on the program.

Most Recent

Committee Action: The last set of extensive investigative hearings held on the program were conducted in 1984.

In December of 1982 the Committee issued its last full Committee Report covering the Program entitled: Minority Business Development Efforts of the Small Business Administration (H. Rept. 97-956). A principal finding of that report concluded: "There is virtually a total lack of any initiative on the part of the Executive Branch to institute sanctions or remedies against those large prime contractors who have violated the law. It appears that Federal agencies have subordinated this program to all other objectives of the acquisition process. Federal procurement personnel, in addition, have not been held fully accountable for their mismanagement."

GAO Investigation: By letter dated March 6, 1986 the former Chairman of the Committee requested that GAO investigate the subcontracting program at the following agencies: Navy, General Services Administration and the Department of Energy. That investigation was expanded by letter dated June 2, 1987, when Chairman LaFalce requested GAO to investigate the award of large contracts for utility services.

In May of 1988 GAO issued its report on the three (3) designated agencies. That report has been embargoed by the full Committee for release at the hearing. Among other things the report found that:

. Of 2,052 contracts reviewed, 1,008 had no plans. However, by law, about 11% of that latter amount were required to have plans. A representative sample of contracts was reviewed at each agency. Eleven of the 503 contracts (2%) reviewed at GSA were awarded without required plans; 15 of 233 (6%) at Energy and 84 of 272 contracts (31%) at the Navy were similarly deficient.

. With the Navy, each of the 84 instances of non-compliance admittedly "were the result of oversight."

. All agencies could not recall any instance of taking remedial action against a contractor for failure to achieve goals contained in plans.

3

. Incentive clauses to increase subcontracting with small business and SDBs, while authorized by law, were never used at GSA and only very rarely used at Energy. GAO reviewed three (3) Navy Commands, and incentives had only been used by one such Command.

With respect to utility companies, the GAO has conducted its field investigation and legal review and, among other things,

. has found that eleven (11) utilities refused to enter into contracts with the Federal Government due solely to the requirement that such contracts must contain subcontracting plans. Some of those utilities are fairly substantial in size (e.g. PEPCO, Long Island Lighting Company, Florida Power and Light Co. of Miami); and

. has determined that even if formal contracts are not executed, the utilities are legally required to have plans. There is a March 27, 1987 Department of Justice legal opinion that holds this same position. However, no legal action by the government is reported to have taken place against the offending utilities.

